Supreme Court, U.S.
FILED

No. (1) 081507 JUN 3 - 2009

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In The

Supreme Court of the United States

TERRY L. MEIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), waives sovereign immunity in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Does this provision render the United States liable in circumstances where the relevant state law makes corporations, but not private individuals, liable for certain acts?

2. Where the VA has admitted that its emergency-services protocol broke down, causing damage to a veteran in its care, is there a cause of action under the FTCA, where the relevant state law allows plaintiffs to bring claims against healthcare providers for failing to provide emergency services?

3. Where state statutes define a standard of care for when healthcare providers are required to provide records to their patients, and the VA admittedly failed to satisfy that standard of care, can the VA be held liable under the FTCA for breach of fiduciary duty resulting in emotional distress damages?

4. Where the VA admits that its physicians owe fiduciary duties to their patients, is the VA liable for breach of fiduciary duty under the FTCA where a VA physician admits that he did not accurately describe his malpractice and disciplinary history in response to direct questions from a patient?

LIST OF PARTIES

Terry L. Meier, an individual, was the plaintiff and appellant in the courts below.

The United States of America was the defendant and appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion below is unreported. It appears in the Appendix. App. 1-5. The opinions of the district court are also unreported. They appear in the Appendix. App. 6-29, 30-56.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment February 3, 2009. App. 1. The present petition is timely under 28 U.S.C. § 2101(c). (Petitioner received an extension of time to June 3, 2009 within which to file this petition.)

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346(b)(1) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money

> damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

INTRODUCTION

This petition is the last step in a litigation undertaken to vindicate the rights of veterans like Meier in their dealings with the Veterans Administration. The VA acknowledges it owes veterans fiduciary duties like any other physician or hospital.[1]

Notwithstanding its implicit and explicit promises of competent care, respect for individual autonomy rights and patient privacy, the VA in treating Meier failed miserably in fulfilling *any* of those promises. The VA *admitted* below that it failed to treat Meier competently, and that one of its physicians misled Meier, in answer to direct questions, about that physician's malpractice history and

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[1] *See*, July 2003 Report "Ethical Boundaries in the Patient-Clinician Relationship," VHA National Ethics Committee, at: http://www.ethics.va.gov/docs/necrpts/NEC_Report_20030701_Ethical_Boundaries_Pt-Clinician_Relationship.pdf.

professional qualifications. The VA also indisputably failed to produce complete medical records to Meier when he requested them and failed to answer a *single* question concerning his treatment, condition or the malpractice/disciplinary history of his doctor, a physician who breached *all* of his professional duties in treating Meier.

Meier, unlike the vast majority of veterans who might be harmed by the VA, had the resources and, as a retired attorney, the ability, to pursue tort claims against the VA. However, like every veteran, Meier also had to battle the institutional advantages the VA possesses. Among these are: (1) the fact that veterans bringing FTCA claims have no right to a jury trial; (2) that veterans mistreated by the VA very seldom have legal representation; (3) that the cost of pursuing litigation against the government, including tens of thousands of dollars in discovery costs alone, is likely to be overwhelming;[2] (4) that the government has at its disposal attorneys who are knowledgeable about, indeed specialized in, defeating veterans' claims, as well as access to experts whom the veteran may not even have the resources to depose;[3] and, (5) that if the courts side with the VA, the veteran faces the cost and lengthy delay of the appeal process.

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[2] Meier has already spent over $160,000 in his attempt to force the VA to fulfill its legal duties.

[3] The VA designated two "expert witnesses." The total cost of these one-day depositions, including expert fees, was approximately $16,669.

Most veterans, faced with these obstacles, give up. Meier did not. He seeks in this litigation solely to hold the VA accountable not only for its *admitted* breaches of duty, but to require it to live up to the promises of competent care that it makes so publicly and so often. Unfortunately, as current news accounts confirm, the government's response to Meier's lawsuit is consistent with the VA's practices with regard to veteran's care – *extravagant promises of the most trustworthy and competent care, followed by a shrug when that care falls below even the most basic standards.* Meier – and every veteran – has a right to demand that the VA conform its practices to its fiduciary duties and to its own "Mission Statement":

> The mission of the Veterans Healthcare System is to *serve the needs* of America's veterans. . . . VHA needs to be a comprehensive, integrated healthcare system that provides . . . *excellence in service as defined by its customers*, and . . . *needs to be an organization characterized by exceptional accountability.*

See, http://www1.va.gov/Health_Benefits/page.cfm?pg=1 (emphasis added).

The courts below dismissed each of the following questions as outside their jurisdiction under the FTCA and not actionable under state law.

- Must VA doctors be competent and ethical; must they fulfill all fiduciary duties they owe to veterans?

- Must the VA train and supervise those doctors so they comply with state law concerning the practice of medicine including informed consent for risky medical procedures?
- Must the VA provide any emergency care to veterans those doctors grievously injure?
- Must the VA provide objective and impartial QA/Peer Reviews when those doctors injure veterans?
- Must the VA maintain adequate and accurate medical records; must all records be timely produced upon request?
- Must the VA provide to veterans truthful, timely information concerning their medical condition, treatment course and the malpractice history of their assigned physicians?
- May the VA disclose whatever veterans' medical records it wants, at any time, to any VA employee (*including counsel*), contrary to federal and state law relating to constitutional rights of privacy?

These decisions by the courts below have an enormous impact on the most significant and fundamental veterans' rights. Given that Meier communicated the facts and the law to VA national

leaders, in detailed letters starting in 2003,[4] and deposed VA regional leaders in the lawsuit, it is safe to assume that VA leadership is aware of the outcome of this very contentious litigation, meaning that it will have a nationwide impact on the millions of veterans who rely on the VA system.

This petition raises substantial questions surrounding application of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b)(1). First, the courts below ruled that the United States government cannot be liable under the FTCA for acts which, under governing state law, only corporations, not individuals, may be liable. This is a novel holding, apparently never adopted by another appellate court and is in conflict with statements of this Court and the intent of the FTCA. This Court should grant this petition to clarify whether Congress intended to waive sovereign immunity in any situation where a "person" – including a corporation – would be liable under state law.

Second, the courts below – faced with undisputed facts and clear law – simply misconstrued or ignored controlling state-law precedent. While this Court may not routinely review the application of state law by the lower federal courts under the FTCA, it may

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[4] From 2003 to 2005, Meier wrote 11 letters to senior VA management; not one ever answered a single question about his condition, his treatment course or Dr. Cheung's malpractice/disciplinary history.

grant certiorari where state law provides the rule of decision and the opinion of a federal court of appeal is in conflict with that of the highest court of a state (or of its intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise). *See, e.g., Six Companies v. Highway District*, 311 U.S. 180, 181 (1940).

Meier's claims were based upon common law legal principles that vary little, if at all, between different states – the fiduciary duties and conflict of interest obligations doctors owe to their patients and their duties to respect their patients' constitutional privacy and autonomy rights.[5] "It is evident that the [FTCA] was not patterned to operate with complete independence from the principles of law developed in the common law and refined by statute and judicial decision in the various states." *Richards v. United States*, 369 U.S. 1, 6-7 (1962).

The facts and law at issue here are, as a practical matter, undisputed; the only question is whether the Ninth Circuit, in applying the law to the undisputed facts, reached an acceptable conclusion. The importance of the principles involved – *i.e.*, the VA's responsibility to provide competent care and to fulfill its admitted fiduciary duties – cannot be overstated. The VA is the principal healthcare provider for

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[5] In fact, the Ninth Circuit has long recognized that negligence and breaches of fiduciary duty are actionable under the common law. *See, e.g., DePinto v. Provident Security Life Ins. Co.*, 323 F.2d 826, 837 (9th Cir. 1963).

millions of American servicemen and women. If the VA is allowed – as it has in this instance – to "wink" at its own incompetence and breaches of fiduciary duties, then the promises it has made to veterans are hollow and the VA endangers the safety of the veterans who rely upon its care.

STATEMENT OF THE CASE

A. A VA Doctor Perforated Meier's Colon And Then Failed Accurately To Disclose His Malpractice History When Meier Asked Directly About It.

Petitioner Terry L. Meier, a resident of Berkeley, California, is entitled to lifetime VA care as a result of service in Vietnam, where he was shot in the leg. He has a 90% disability rating with the VA, with a "class 1 priority" status. ER1262.[6]

On September 17, 2002, VA gastroenterologist Dr. Eddie Cheung performed a colonoscopy on Meier, which disclosed numerous polyps in Meier's colon and a "blanket-type" tumor in Meier's rectum. ER200-01, ER356. Cheung suspected that this was a "villous adenoma," a tumor that will inevitably turn into cancer and should be removed. ER189-94, ER198, ER100-01. Prior to this and the other procedures outlined below, Meier signed an "informed consent"

[6] References to "ER" denote the excerpt of record filed in the Ninth Circuit.

form that indicated that perforation was a risk of a colonoscopy. ER741.

Cheung met with Meier on October 18, 2002 and advised him that he should have the rectal tumor removed through surgery because attempting to remove it with the colonoscope created "a very high chance" of perforation. ER245, ER743, ER199-200; *see,* ER245-56, ER360. Meier informed Cheung that, because of the numerous surgeries he had undergone as a result of his Vietnam wounds, he would not consider another surgery unless there was no alternative. ER249. Cheung agreed to attempt to assess and remove any progression of the rectal tumor through another colonoscopy. ER360, ER743. At trial, Cheung admitted that there was a "very high" risk of perforating Meier's colon at the tumor site in the procedure he agreed to undertake. ER200. Cheung also admitted that he never told Meier about the serious injuries and significant complications that a perforation at the tumor site might entail. ER267-68, ER305-07, ER426, ER469. These risks included fecal incontinence, sexual impotence, urinary urgency, colostomy (removal of the colon), bladder complications and diarrhea. ER267-68, ER305-07, ER323-37.

Cheung performed a second colonoscopy on December 19, 2002 and removed portions of the rectal tumor. ER264-65, ER271-72, ER745. He also removed numerous polyps, including one in the cecum, at the opposite end of the colon. ER272-73.

The following day, Meier experienced intermittent sharp abdominal pains. ER903. Meier attempted to reach both the VA Oakland Outpatient Clinic and the VA's local "After Hours Emergency" telephone line. At each number, he reached a recording and left a message. ER903.

Meier next located the discharge instructions he had been given by the VA, where the attending nurse had written the number for the Urgent Care unit at the VA hospital at Mather Air Base. ER903, ER974a. Meier telephoned Mather and finally spoke with a VA employee. ER903. After conversing for about five minutes, it was agreed that he should await a callback from the after-hours emergency number where he had already left a message. ER903. No callback ever occurred. ER904.

The VA's Chief of Staff for Northern California testified that there was a "miscommunication that resulted in . . . delay of [Meier's] care" and that such delay "spawned a review of the program, and changes were made to ensure that it wouldn't happen in other instances." ER962. He characterized this lack of care as "very deeply concerning." ER963.

After waiting for over five hours in agony for a callback from the VA, Meier finally telephoned a friend who drove him to a local hospital. ER566-67. Within hours, Meier underwent emergency surgery to repair a perforation in his cecum, where one of the polyps had been removed approximately thirty-six hours earlier. ER430-31.

Meier met again with Cheung in January 27, 2003. ER184. As one might imagine, given Meier's background as a trial attorney, he wanted answers to a number of questions *before he would consent to any further treatment by Dr. Cheung.* Cheung testified that Meier explained to him that it was very important that both Cheung and the VA be candid with him. ER298, ER747. Cheung's progress notes confirm that Meier told him that "as long as he feels that people are straightforward and not trying to hide things from him, he would have no problem and the matter [the perforation and emergency surgery] will be over." ER747.

Meier asked Cheung if he had been sued for malpractice. ER297. Cheung told Meier that he had been sued only once. ER297, ER433. According to Meier, Cheung described the lawsuit as one where he was not scheduled to perform surgery, but had been drawn in to assist a friend on a surgery involving a person who was not Cheung's patient. ER433-34, ER517-18. Cheung, on the other hand, testified that he did not remember if he told Meier anything more about this lawsuit, but admitted that he had never been sued in circumstances such as Meier described. ER297-98. Meier testified that he also asked Cheung whether there was anything else in his professional background of which Meier should be aware and that Cheung indicated there was not and that he was telling the truth. ER434, ER517-24. Cheung testified that he could not remember if he had been asked about his professional background other than whether he had been sued for malpractice. ER297.

Cheung performed a third colonoscopy on June 24, 2003. ER309. Cheung again removed as much of the rectal tumor as he felt he could safely remove, as well as other polyps. ER316, ER750.

Meier had a follow-up with Cheung on July 7, 2003. ER753. Cheung and Meier spoke extensively concerning Meier's frustrations with his inability to obtain his medical records, which he had been requesting from the VA. ER317, ER753. According to Cheung's notes, Meier told him that he had "no problem with you, I feel you are upfront and honest with me." ER753. Cheung reassured Meier that he had "*given him all the information that [Cheung] had.*" ER753.

B. The VA's Failure To Respond To Meier's Inquiries, Or To Produce Full Copies Of His Medical Records, Leads Meier To Discover That The VA Doctor Who Perforated His Colon Was On Probation With The California Medical Board At The Time He Assured Meier That He Had Told Meier That He Had Given Meier "All The Information" He Had.

Following his surgery, Meier began an extensive correspondence with the VA to try to obtain information concerning his treatment by Cheung. In a series of increasingly detailed letters, Meier asked the VA to provide him with complete, unedited copies of his medical records pertaining to his colonoscopies. *See*, ER976, ER995, ER1001, ER1028, ER1034,

ER1037. While the VA indicated on several occasions that it had produced "all" of the requested records (ER951), it did not – copies of some of Meier's medical records, including extensive test orders and results, electronic scans of handwritten notes and clear copies Meier had been requesting for years were not provided to him until after this lawsuit was commenced; other requested documents were never produced and some were destroyed by the VA. ER906-09; *see,* ER1114, ¶¶ 7, 8.

Because the VA was not responding to his requests, in September 2003 Meier "Googled" Cheung's name and discovered a March 2001 order from the New York Medical Board requiring Cheung to surrender his license due to professional misconduct and "moral unfitness." ER776. That order, in turn, led Meier to the California Medical Board, which provided Meier with a settlement agreement it had reached with Cheung. ER755-71.

As Cheung admitted at trial, the settlement concerned the circumstances under which Cheung had been denied or withdrawn applications for staff privileges at three hospitals beginning in 1993. ER129-33, ER135-37, ER140-41, ER755-71. In each of these applications, Cheung indicated, *under penalty of perjury*, that there had never been a judgment or settlement in a malpractice suit against him (or, in two instances, whether there had ever been any suits at all, whether reduced to judgment or not). In fact Cheung had settled at least one such suit and another was pending at the time of his application. In addition, in the last application, submitted in 1996,

Cheung misrepresented *under penalty of perjury* that his staff privileges had "never been suspended or revoked," notwithstanding that the second hospital to which he had submitted false information had revoked his staff privileges *less than two months before*.

The two lawsuits which Cheung failed to reveal were both wrongful death actions brought by the families of his patients. In the first (referred to in the record as the *Chin* case), one of Cheung's patients died undergoing elective gallbladder surgery. ER121, ER790-802, ER797. Cheung settled *Chin* about one month after filing for a payment of $29,999, just below the $30,000 threshold for reporting to the California Medical Board. ER121, ER802.

In addition, Cheung was sued by another patient in 1989 in a case referred to in the record as the *Llarena* case. ER121, ER780-88. Cheung filed an answer in *Llarena* in February, 1990; it was dismissed on August 3, 1990 as a sanction against the *pro per* plaintiff who failed to follow proper procedure and to make mandatory court and discovery appearances.[7] ER785, ER524-27.

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[7] After judgment was entered, Meier discovered two other wrongful-death actions filed against Cheung. At trial, Cheung falsely testified that the *Chin* and *Llarena* cases were the *only* malpractice lawsuits ever filed against him.

Significantly, the government is currently attempting to collect over $28,000 in court costs from Meier, based upon a judgment obtained through Cheung's perjured testimony, despite the VA's continuing fiduciary duties and conflict of interest obligations owed to Meier.

Meier's discovery that Cheung had not disclosed his probation and had misrepresented his malpractice history increased Meier's already-existing frustration with the VA for its failure to produce his medical records or respond to his inquiries. After a further examination by the head of the VA's Northern California gastrointestinal group, Dr. Leung, in February 2004, Meier pressed the VA to authorize him to seek treatment from non-VA personnel, so that Meier could receive unbiased advice. ER905, ER1370.

In October 2004, Meier and the VA signed a contract, drafted by the VA, for him to be evaluated by non-VA physicians. ER1370. The VA also promised to provide Meier with his medical records. ER1370.

In a letter sent after the VA signed the contract, Meier informed the VA of a number of records that had *not* been provided, including VA personnel's handwritten notes and extensive test orders and results. ER1059-65. As noted, some of these records were not provided until after this lawsuit was commenced, others were never produced or were destroyed by government employees. ER906-09; *see,* ER1114, ¶¶ 7, 8.

C. Meier's Lawsuit Against The VA Relies Upon The VA's Undisputed Fiduciary Duties And Violation Of Meier's Personal Autonomy Rights.

Meier, acting in *pro se*, filed a verified complaint on October 28, 2005, stating 10 causes of action under

the Federal Tort Claims Act ("FTCA"). Each cause of action alleged that the VA's employees violated Meier's personal autonomy rights under the California Constitution, Article 1, Section 1, breached their fiduciary duties and created an unreasonable risk of harm:

- Counts 1-3 alleged that the VA's employees failed to obtain Meier's informed consent for each of three colonoscopies. ER1263-70.
- Count 4 alleged that the VA's employees failed to exercise reasonable care in selecting and hiring staff, including Cheung. ER1270-72.
- Count 5 alleged that the VA failed to reasonably train and supervise its employees so that they would "correct . . . known deficiencies in the quality of care and treatment" of Meier. ER1272-74.
- Count 6 alleged that the VA failed to provide *any* emergency care during Meier's perforation emergency, in part because the VA failed to formulate and enforce reasonable policies for the treatment of emergencies. ER1274-76.
- Count 7 alleged that the VA failed to formulate and enforce reasonable policies regarding Quality Assurance reviews and that the VA failed to conduct a reasonable and impartial Peer-Review/QA after Meier's perforation. ER1276-78.

- Count 8 alleged that the VA's employees failed to maintain and preserve adequate and accurate medical records for Meier and to provide Meier copies of those records. This Count included allegations that the VA breached a written contract that provided, *inter alia*, that the VA would give Meier his medical records and that potential evidence had been lost, destroyed and/or altered after the VA had been warned to save that evidence. ER1278-83.

- Count 9 alleged that the VA failed to formulate reasonable policies to respond to patients' questions regarding medical issues and that the VA failed to respond to *any* of Meier's questions concerning his care, treatment and medical condition, as well as questions concerning the professional competence and ethics of VA employees, including Cheung. ER1284-86.

- Count 10 alleged that the VA's employees made unauthorized disclosures of Meier's medical records and then ignored his requests for an accounting of who received the same. ER1286-90.

In December, 2006, the district court granted the government's motion for summary judgment with respect to Counts 4-10 (*i.e.*, all claims except those alleging lack of informed consent). The court found that it lacked jurisdiction under the FTCA to entertain Counts 4-9, because it believed that

California would not provide a remedy for the wrongful acts alleged. App. 4-19. The court found jurisdiction over Count 10 (wrongful disclosure of medical records), but asserted that there was no evidence that those records had been disclosed to anyone other than Meier. App. 26-27.

The district court's summary judgment ruling made a number of patent legal and factual errors. For example (in addition to the errors discussed in the Argument below), the court asserted that the "VA [adhered] to its established protocols for background checks" on Cheung. App. 14, n.3. However, the VA's "Physician Qualification Standard" expressly mandates that "[a] physician who has, or has ever had, any license(s) revoked, . . . restricted, limited, or issued/placed in a probational status may be appointed only in accordance with regulations issued by the Under Secretary for Health or designee." ER1214; *see,* VHA "Physician Qualification Standard" (MP-S, Part II, Chapter 2, APPENDIX B, dated October 30, 1998).

The government admitted that Cheung's license had, in fact, been revoked (ER601-02); his license was also "restricted, limited, or issued/placed in a probational status." ER758-62. And the VA submitted *no evidence* that these regulations had been followed in hiring Cheung. In fact, Meier had direct evidence showing that those requirements had not been followed; Cheung's VA Employment Files disclosed documents establishing that government employees

failed to follow the above written directive when hiring Cheung.

Again, the court summarily adjudicated Count 7 of the complaint alleging lack of adequate peer review, when the government's summary judgment motion did not even *address* Count 7. And the court ruled that Meier had no claim for unlawful disclosure of his medical records because he purportedly alleged unlawful disclosure only to himself. App. 27-28. In fact, Meier's verified complaint (which, in the Ninth Circuit, can be used as evidence in opposing summary judgment) alleged specifically that the VA made

> unauthorized publications of information, documents, . . . concerning plaintiff's treatment, condition and/or conversations to VA non-treating medical staff and non-medical staff (including, but not limited to, VA and/or U.S. counsel) and by allowing *ex parte* communications between plaintiff's doctors concerning plaintiff's treatment, condition and/or conversations and VA non-treating medical staff and non-medical staff (including, but not limited to, VA and/or U.S. counsel) without first securing plaintiff's fully-informed, written consent.

ER1288-89.[8]

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[8] The VA's privacy policy states that the VA will *not* disclose documents to *anyone*, except in limited circumstances outlined in the policy. None of those circumstances were applicable here. (For example, the policy states the VA may disclose health

(Continued on following page)

The district court decreed that the only issues for trial were to be "whether Cheung failed to obtain Meier's informed consent when he did not inform Meier of: (1) various medical risks that may have arisen as a result of the colonoscopies, or (2) Cheung's medical malpractice and disciplinary history." App. 28-29.

Bench trial took place in early 2007. At the close of plaintiff's case, the court granted, from the bench, the government's motion for involuntary dismissal under Rule 41(b), FRCP. Judgment entered on February 3, 2007. ER20-21.

On appeal, the Ninth Circuit, in an unpublished memorandum disposition,[9] affirmed the district court in full, on the same grounds articulated by that court.

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information to counsel, but that is to occur only "[t]o defend the VA in judicial or administrative proceedings." The above disclosures to counsel occurred nearly *21 months* prior to service of this lawsuit.). *See,* VHA "Notice of Privacy Practices" (eff. date: April 14, 2003) (found at http://www1.va.gov/vhapublications/viewpublication.asp?pub_id=1089).

In addition, the VA's failure to heed Meier's instructions restricting distribution of his records is a blatant violation of 38 C.F.R. § 17.33(f), which provides that "[i]nformation gained by [VA] staff from the patient or the patient's medical record will be kept confidential and will not be disclosed except in accordance with applicable law."

[9] Because the Ninth Circuit opinion is unpublished, there is no chance that a California state court will be able to correct any misstatement of California state law made by the Circuit.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit Misapplied The FTCA By Holding That The United States Could Not Be Liable Under That Act If State Law Imposes Liability On Corporations But Not Private Individuals.

Meier's fourth and fifth causes of action alleged that the VA had violated duties with respect to its hiring, training and supervision of Cheung and other VA personnel and by failing to correct "known deficiencies in the quality of care provided" to Meier (ER1270-74). The district court recognized that, under California law, an injured patient has a cause of action against a hospital for its failure "'to ensure the competence of its medical staff through careful selection and review.'" App. 12-13 *citing, Elam v. College Park Hospital*, 132 Cal.App.3d 332, 340-41 (1982).[10] The court concluded, however, that no such claim was cognizable under the FTCA because that statute provides for liability only "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." App. 13, *quoting* 28 U.S.C. § 1346(b)(1). According to the district court, this provision means that the government cannot be liable where state law provides that only a corporation, not an individual, would be liable. ER29.

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[10] An *Elam* cause of action holds the hospital liable *as an entity* for its collective or corporate negligence in hiring and retaining staff. *See, Bell v. Sharp Cabrillo Hosp.*, 212 Cal.App.3d 1034, 1051 (1989).

The court then concluded that, in California, the liability recognized in *Elam* applies only to corporations, not private persons.[11] App. 14.

The Ninth Circuit summarily affirmed this conclusion because it believed, based on its own decision in *Adams v. United States*, 420 F.3d 1049

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[11] Ironically, Congress itself looked to California law – and *Elam* in particular – in setting standards for the VA. Thus, the Senate Veteran's Affairs Committee report on the Veteran's Administration Health Care Amendments Act of 1985 noted:

> The Committee believes that clinical privileges are a very fundamental component of a physician's or other health-care professional's employment with the VA . . . *Also, the Committee strongly believes that clinical privileges are directly related to quality of care and patient safety and, as such, the [VA] has a* ***grave responsibility*** *to ensure that clinical privileges are judicially [sic, judiciously] granted, monitored, and revoked. . . .*
>
> With respect to the provision in the committee bill relating to credentialing of VA health-care personnel, the committee has followed an evolving trend in quality-assurance programs to place an increased emphasis on credentialing procedures. . . . In addition to these revised accreditation standards . . . , case law relating to malpractice judgments has identified certain duties that a health-care facility owes to its patients. *See, Elam v. College Park Hospital*, 132 Cal.App.3d 322 (1982) . . . These duties include:
>
> . . .
>
> – The duty to carefully screen and make appropriate inquiries on applicants for hospital privileges.
>
> – The duty to monitor and supervise the competency of its medical staff through appropriate quality-assurance mechanisms.

Senate Rep. 99-101, 1985 U.S.C.C.A.N. 783, 825, 831-832 (1985) (emphasis added).

(9th Cir. 2005), that "for purposes of the FTCA, 'persons' does not include corporate entities." App. 3.

Assuming, for the sake of argument, that the courts below properly understood California law, the important point is the courts' conclusion that the FTCA does not permit an FTCA lawsuit against the United States in a situation where state law would make only a corporation, not an individual, liable.

This Court has recognized that the FTCA "waives the Government's immunity from suit in sweeping language," and has cautioned against interpretations of the statute that "run the risk of defeating the central purpose of the statute." *Dolan v. United States Postal Service*, 546 U.S. 481, 492 (2006) (internal quotation marks omitted).

The relevant provision of the FTCA, 28 U.S.C. § 1346(b)(1), gives the district courts jurisdiction of all claims against the Government for losses:

> caused by the negligent or wrongful act or omission of any employee of the Government . . . , under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Nothing in this Court's jurisprudence suggests that this provision limits government liability in situations where only a corporation, but not a private individual, would be liable under state law. Indeed, in *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), this Court noted that "[t]hese provisions [28 U.S.C.

§§ 1346b, 2674], given their plain natural meaning, make the United States liable [for government employees'] negligence . . . if, as alleged in the complaints, [state] law would impose liability on private persons *or corporations* under similar circumstances." *Id.* at 318 (emphasis added).

Similarly, in *United States v. Olson*, 546 U.S. 43 (2005), this Court held that section 1346(b)(1)'s limitation of liability to "private" persons indicated that the United States could not be liable if the analogous state law applied only to *municipal* entities. As the Court put it "the [FTCA] requires a court to look to the state law liability of private *entities*, not to that of public entities, when assessing the Government's liability under the FTCA 'in the performance of activities which private persons do not perform.'" 546 U.S. at 46 (emphasis added), *quoting Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955). This Court thus assumed that the United States could be liable where private *entities* would be liable under state law.

In reaching the opposite conclusion, the Ninth Circuit relied on its own decision in *Adams*, which construed not section 1346, but rather 28 U.S.C. § 2671, a provision defining "employee of the government" for purposes of determining whether the United States may be liable for torts committed by employees. The Ninth Circuit determined that section 2671 did not include corporations because the context made clear that Congress had intended the word

"persons" in that section to be limited to natural persons. *Id.*

The reasoning of *Adams*, however, does not apply to 28 U.S.C. § 1346(b)(1). That section is concerned with the liability of the United States as an entity rather than with the liability of individual government employees. While section 2671's listing of "persons," read in the context of its enumerated list of "government employees," is intended to limit government employees to natural persons, there is nothing in section 1346(b)(1) that indicates a similar limitation.

In the absence of a limitation in the language of section 1346 that could plausibly be read as confining government liability to individuals, it must be construed, as required by the Dictionary Act as including corporations. 1 U.S.C. § 1 ("the words 'person' and 'whoever' include corporations . . . as well as individuals").

Given that the Ninth Circuit's interpretation of the FTCA is idiosyncratic, at best, and given the need for uniform application of that statute, this Court should grant certiorari to ensure that claimants against the United States are not deprived of their ability to bring claims that, were they committed by a non-government actor, would be actionable under state law.

B. The Ninth Circuit's Treatment Of Meier's Claim Against The VA For Its Admittedly Negligent Emergency Treatment Is In Conflict With Undisputed California Law.

Perhaps the most troubling of the Ninth Circuit's repeated casual refusals to follow California law lies in its treatment of Meier's claim for damages resulting from the breakdown of the VA's emergency services system. As noted, the responsible VA supervisor *admitted* that Meier's repeated emergency calls went unanswered, and that the breakdown "spawned a review of the program, and changes were made to ensure that it wouldn't happen in other instances." ER962. He characterized Meier's care as "very deeply concerning."[12] ER963. There is thus no doubt that Meier had a viable claim against the VA for negligence. The hours Meier spent in agony awaiting a call from the VA's emergency-services facilities were also sufficient to demonstrate that he suffered damages, as stated by the district court:

> Emergency surgery was required to . . . repair the perforation. This resulted in Frankenstein-type incisions and stitches all up and down his stomach and side. [Meier] was in the hospital for ten days, recovering. He testified to the pain and the weakness

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[12] Notwithstanding its own admissions at deposition, the VA insisted, in response to requests for admission, that it always met the standard of care in treating Meier and that it "never failed to exercise reasonable care in any way with respect to [Meier's] claims."

> and the loss of weight, and all that is entirely credible, and the Court accepts that. *There's no doubt that Mr. Meier went through excruciating pain, both before and after that remedial surgery.*

App. 36 (emphasis added).

The courts below, however, held that Meier had done nothing more than "point to a basis in California law for individual liability in negligent administration of emergency services" based on California Health and Safety Code section 1799.110(a), but could "not provide support for liability for development of policies related to emergency services." App. 3-4. This claim not only mischaracterizes Meier's complaint – which was not simply that the VA had failed to "develop[ ] policies related to emergency services," but rather that such failure was the proximate cause of his injuries – but it flies in the face of controlling California precedent.

In *Baxter v. Alexian Brothers Hospital*, 214 Cal.App.3d 722 (1989), an emergency room patient brought an action against a hospital for injuries suffered as a result of its failure to have surgical staff available for her care. The court found that the complaint stated a cognizable claim against the hospital, not subject to the conditions stated in Health and Safety Code section 1799.110. Meier's claim was virtually indistinguishable from that of the patient in *Baxter* – as in *Baxter*, Meier was not alleging that a specific doctor had committed malpractice in treating him, but rather that a

healthcare provider's policies resulted in a complete failure to provide him with emergency care, a failure that indisputably damaged him. *See,* ER1275.

The Ninth Circuit thus unquestionably misapplied California law to Meier's sixth cause of action. Given the size of the veteran population in California (and the general principle of negligence at stake for *all* veterans seeking VA care), this misapplication presents an important error which this Court should correct. The courts below have, in essence, said that the VA can commit negligence that results in indisputable, significant harm to a veteran, without suffering the consequences that any *other* healthcare provider would suffer. *The courts have read fiduciary duties and conflict of interest obligations, constitutional rights of autonomy and privacy out of the veterans healthcare system.*

C. The Ninth Circuit Misapplied California Law Regarding A Fiduciary's Liability For Emotional Distress Damages.

Throughout their analyses, both the district court and the Ninth Circuit consistently failed to acknowledge that breach of fiduciary duties lay at the heart of all of Meier's claims. That failure is perhaps most apparent in the Ninth Circuit's treatment of Meier's allegations, in his eighth and ninth causes of action, that he had been damaged by the VA's failure to respond to his questions or to produce full copies of his medical records. Again, there was *no dispute* that Meier's factual allegations were correct – the VA

admitted that it did not produce many of Meier's medical records (which he had been demanding for years) until well after the underlying litigation had commenced, while some of the records were never produced at all or were destroyed. ER906-09; *see,* ER1114, ¶¶ 7, 8. Moreover, the VA never answered Meier's questions.

It is clear that Meier's requests for records were reasonable. He was asking for such items as (1) Cheung's handwritten notes (which would memorialize Meier's questions prior to the colonoscopies), (2) nurses' records of the colonoscopies, (3) clear copies of documents that had been provided but were improperly copied, (4) pathology reports, (5) extensive laboratory test orders and results and (6) documents relating to his telephone calls to the VA emergency numbers. ER1034. Some of these documents were not produced until after Meier had deposed the VA's regional supervisor and, in the course of that deposition, requested the documents specifically. Four days later they were produced at a settlement conference – more than two years after they were first requested and after Meier had been forced to expend over $15,000 in litigation expenses to obtain them. *See,* ER906-09.

Meier's inquiries about his condition were similarly reasonable. The requests the VA ignored involved such basic issues as why there were discrepancies in Meier's medical records concerning the tumors found throughout his entire colon (some records referred to tubular, others to tubulovillous

adenomas, *a distinction that has great bearing on the predicted cancerous course of Meier's tumors*), why Cheung had withheld four photographs taken during the second colonoscopy when the perforation occurred, and Cheung's true malpractice and disciplinary history.[13] ER1015, ER1034, ER1049.

Meier was trying to decide how he wished to be treated for a condition that will prove *fatal if untreated*; he had a constitutional right to make that decision with timely access to all the facts. *See,* California Health and Safety Code § 123100:

> The Legislature finds and declares that every person having ultimate responsibility for decisions respecting his or her own health care also possesses *a concomitant right to access to complete information respecting his or her condition and care provided.*

(Emphasis added.)

The Ninth Circuit acknowledged that various California statutes *require* that healthcare providers furnish records to their patients upon demand. *See, e.g.,* Cal. Health and Safety Code § 123100 *et seq.*, but dismissed these statutes as irrelevant because they allegedly do not "establish individual tort liability for

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[13] Despite repeated requests for this information since May 2004, including one dated May 11, 2009, the VA has yet to respond in any fashion. Yet, in response to requests for admission, the VA asserted that it met all its obligations in responding to Meier's requests and inquiries.

emotional distress damages related to failure to produce medical records or . . . to answer patient questions." App. 4. This conclusion completely misrepresents California law and the significance of the statutory obligation to produce patient records and respond to patient questions.

Meier did not rely upon California statutes requiring that healthcare providers give their patients copies of their records as *imposing liability* for the failure to produce records. Rather, Meier relied upon those statutes to establish the fiduciary obligation of doctors and hospitals. In other words, these statutes stated the *standard of care*. Indeed, California Health and Safety Code § 123110(i) states that a healthcare provider engages in unprofessional conduct when it fails to provide records. Thus, the VA indisputably breached its fiduciary duty – *i.e.*, the relevant standard of care – when it failed to produce Meier's records.[14]

Once a breach of fiduciary duty is established, then the question becomes whether Meier was entitled to recover emotional distress damages for this breach. And on that point, California law is

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[14] The VA's own privacy policies state that it will promptly provide records when requested and that it will give every veteran an accounting of how the records were distributed. *See*, http://www1.va.gov/vhapublications/viewpublication.asp?pub_id=1089. *Meier made repeated written requests for said accounting; to this day the VA has failed to provide the same.*

unequivocal. In *Scripps Clinic v. Superior Court*, 108 Cal.App.4th 917 (2003), a healthcare clinic argued it could not be liable for emotional distress inflicted when it abruptly terminated the plaintiff as a patient. *Id.* at 931. The court held that abandoning a patient was a breach of fiduciary duty and that the clinic could be liable for the resulting emotional distress. *Id.*; *accord, Branch v. Homefed Bank*, 6 Cal.App.4th 793, 800 (1992). The VA is similarly liable for emotional distress caused by a breach of fiduciary duty.[15]

By ignoring this clear – indeed indisputable – California precedent, the Ninth Circuit failed in its responsibility under the FTCA to follow the law of the state in which the wrongful act occurred. More troubling, however, is the Ninth Circuit's utter failure even to acknowledge that the VA – like any other healthcare provider – owes fiduciary duties to the veterans in its care. Indeed, the VA's relationship to the veterans in its care should be even more solicitous than in the typical private doctor-patient relationship. Not only has the VA made explicit promises to provide medical records when requested, but veterans are likely to need the VA's assistance (as their sole medical provider) to access *other* government benefits. If the VA cannot be trusted to provide

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[15] A refusal to answer questions by or to provide relevant documents to a patient concerning the progress of a tumor that will turn into cancer is, on its face, highly likely to produce emotional distress.

medical records as requested, a veteran may have no recourse except to sue -- and, because the VA *does* provide care for the physical injuries inflicted, may not be able to show any damage beyond emotional distress. To hold – as the Ninth Circuit does here – that emotional distress is somehow not cognizable as damages when the VA engages in clear breaches of fiduciary duties essentially immunizes the VA from *any* liability for the damage it causes when it breaches its fiduciary duty.

Every right Meier demanded in this case – access to medical records, competent care, informed consent – is guaranteed not only by relevant state law, but by written VA standards. By ignoring these rights, the courts below have, in effect, proclaimed that they exist only on paper. The fiduciary duties the VA owes its patients can be ignored, employees who do so will never be held accountable and they may continue compromising patient safety secure in the knowledge that the government will vigorously defend their misdeeds with no regard to the law, facts or ethics.

D. The Court Below Misconceived The Requirements For Informed Consent.

Meier's claims against the VA for its failure to obtain his informed consent to the colonoscopies implicates yet another instance in which the courts below refused to acknowledge the fiduciary relationship between the VA and the veterans in its care.

They also ignored the strong California policy in favor of full, informed consent. California has rejected "medical paternalism" in favor of patient autonomy:

> It is antithetical to our scheme of ordered liberty and to our respect for the autonomy of the individual for [doctors] to make decisions regarding the individual's quality of life. It is for the patient to decide such issues.

Thor v. Superior Court, 5 Cal.4th 725, 739 (1993).

This California policy of relying on patient autonomy rights as a guide to what is required to be disclosed in a physician-patient relationship means that a patient *must* be informed of *any* "known risk of death or serious bodily harm" regardless of whether the doctor considers it a likely outcome. *Cobbs v. Grant*, 8 Cal.3d 229, 244 (1972). It does not matter that these complications may be "rare;" rather, if there is a *known risk*, the doctor has an affirmative obligation to disclose those risks. Nor is expert testimony on the standard of care required – because these risks implicate the patient's autonomy right to determine whether he or she will undergo *any* risk of serious complications, such risks must *always* be disclosed. *Id.*

The law was summarized in *Spann v. Irwin Memorial Blood Centers*, 34 Cal.App.4th 644, 655 (1995):

> [T]he duty to disclose risks of death, serious injury, or significant complications is *not* defined by the custom or practice of the

> medical community. Instead, such a potential peril must be divulged if it would be material to the patient's decision, regardless of the custom in the profession.

(emphasis in original); *accord, Daum v. Spinecare Medical Group, Inc.*, 52 Cal.App.4th 1285, 1301 (1997).

Here, Cheung admitted that there was a "very high" risk of perforation at the tumor site in the second colonoscopy (ER245, ER743, ER199-200), and that such a perforation could cause Meier to suffer fecal incontinence, sexual impotence, urinary urgency, colostomy, bladder complications and diarrhea (ER267-68, ER305-07, ER323-37). Cheung *also* admitted that he never informed Meier that these complications might result from a perforation even though he removed tumor tissue during *each* of the three colonoscopies.[16] ER267-68, ER305-07, ER426, ER469.

Nor does the fact that Meier did not suffer these complications excuse the VA (as the Ninth Circuit appeared to believe – *see*, App. 2-3). If the VA failed to procure intelligent, informed consent, then it is liable

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[16] The VA's own "informed consent handbook" states that a patient must be informed of "[t]he possible undesirable outcomes of a treatment or procedure, including side effects, complications, serious social or psychological harms or other adverse outcomes." VHA Informed Consent for Clinical Treatments and Procedures – VHA Handbook 1004.1 January 29, 2003-U.S. Department of Veterans Affairs, available at http://www.ethics.va.gov/docs/policy/VHA_Handbook_1004-1_Informed_Consent_Policy_20030129.pdf.

for all damages proximately caused regardless of whether: (1) the procedure was skillfully performed; or (2) the injury and damages could have been anticipated. *Berkey v. Anderson,* 1 Cal.App.3d 790, 803, 805 (1969). "If a physician does not make the minimal disclosure, he or she is liable for *all injuries sustained by the patient during the treatment* whether it was negligent or not." *Jambazian v. Borden*, 25 Cal.App.4th 836, 845 (1994) (emphasis added).

> [A patient] is entitled to recover not only for the undisclosed complications but also for *the disclosed complications*, because she would not have consented to any surgery had the true risk been disclosed, and *therefore would not have suffered those complications either.*

Warren v. Schecter, 57 Cal.App.4th 1189, 1204 (1997) (emphasis added). Under these circumstances, Cheung's failure to disclose the known risks of the procedures he undertook was actionable under California law.[17]

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[17] Had Cheung fulfilled his fiduciary duties by fully disclosing all of the horrendous risks of perforation at the tumor site, Meier would not have consented to a second colonoscopy (*when, as Cheung admitted, the risk of perforation was "very high")* and Meier would have avoided not merely the perforation he suffered, but all of the subsequent seven years of fighting with the government over the lack of informed consent and over its subsequent attempts to "stonewall" any investigation. (Ironically, the government, in its answers to requests for admission, denied that it ever attempted to impede Meier's investigation.)

Equally important, and more troubling, is the Ninth Circuit's failure even to acknowledge Cheung's breach of fiduciary duties in his discussions with Meier. It was undisputed below that, when Meier asked Cheung if he had ever been sued for malpractice, Cheung falsely told Meier "only once." In reality, Cheung admitted at trial to having been sued at least twice (and Meier has since discovered that Cheung had been sued at least four times for wrongful death, *see,* note 5, *supra*). Moreover, it is undisputed that Cheung inaccurately described the single malpractice suit to which he admitted. He told Meier that it was a case where he had been called in to help a friend in a surgery where he was not scheduled to participate, involving a person who was not his patient.[18] ER433-34, ER517-18. At trial, Cheung admitted that he had never been sued in such circumstances.[19] ER297-98.

The district court dismissed Cheung's misrepresentations as the understandable product of Cheung's failure of memory and Cheung's desire to put himself in the "best light" (App. 53), notwithstanding that Cheung did not testify that he had "forgotten" the details of the malpractice cases

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[18] While Cheung did not recall whether he told Meier the circumstances of the one malpractice case to which he admitted (ER296-97), the district court credited Meier's account of this conversation. *See,* App. 52-53.

[19] Both cases to which Cheung admitted at trial involved the wrongful death of Cheung's patients while under his care.

against him. The Ninth Circuit simply failed to acknowledge Cheung's false statements to Meier. *Neither court*, however, considered Cheung's misstatements in light of the fiduciary duty Cheung owed to Meier. In California, as elsewhere, a fiduciary is liable even for *negligent* misrepresentation. *E.g.*, *Salahutdin v. Valley of California, Inc.*, 24 Cal.App.4th 555, 562 (1994). Where, as here, it is undisputed that a fiduciary has negligently made false statements, California law provides a remedy.

The Ninth Circuit's failure even to *acknowledge* that a VA doctor made direct misrepresentations to a patient in his care is troubling. Whether or not the VA "had a duty to disclose Dr. Cheung's professional medical history [*i.e.*, his probationary status with the California medical board]" (App. 3) is irrelevant. What is relevant is Cheung's obvious failure to fulfill any of his fiduciary duties or conflict of interest obligations. *See,* note 1, *supra*.

CONCLUSION

This case establishes what a disgraceful "standard of care" is considered "acceptable" by senior VA management and the federal judiciary charged with oversight of that healthcare provider. If the VA is allowed to shrug off its own doctors' significant failures as fiduciaries, all of which were contrary to VA written standards, and the courts permit them to do so, then the promises of competent, ethical care made by the VA have no force at all. A promise made without a mechanism for enforcement is no promise at all.

Given the size of the VA system, the message sent by the Ninth Circuit's decision is appalling – veterans have *no* right to enforce the fiduciary duties the VA has assumed and *no* right to enforce the VA's own policies requiring that it provide medical records and promptly answer patients' questions. Worst of all, the VA has no accountability if it hires feckless staff and patients are injured as a result. If these rulings are allowed to stand, then veterans are forever condemned to the substandard care they are currently receiving *without any legal recourse to ever change it.* As Justice Alito of this Court put it in his confirmation hearings, "***courts are there . . . to protect the rights of individuals against the government or anyone else who violates their rights.***"

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED FEB. 03 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TERRY L. MEIER,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 07-15926

D.C. No. CV-05-04404-WHA

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, District Judge, Presiding

Argued and Submitted December 11, 2008
San Francisco, California

Before: B. FLETCHER and McKEOWN, Circuit Judges, and GORSUCH,** Circuit Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Neil M. Gorsuch, United States Circuit Judge for the Tenth Circuit, sitting by designation.

Terry Meier appeals from summary judgment and judgment on partial findings dismissing his claims under the Federal Torts Claims Act ("FTCA") for emotional distress damages related to colonoscopy procedures performed at a Veterans Administration ("VA") facility. On summary judgment, which we review de novo, the district court dismissed seven claims for failure to establish jurisdiction under the FTCA and one claim for failure to demonstrate a genuine issue of material fact. *Tekle v. United States,* 511 F.3d 839, 843 (9th Cir. 2007). At trial, the district court dismissed Meier's remaining three claims under Federal Rule of Civil Procedure 52(c) for judgment on partial findings. We review findings of fact in a bench trial for clear error and conclusions of law de novo. *Twentieth Century Fox Film Corp. v. Entm't Distrib.,* 429 F.3d 869, 879 (9th Cir. 2005). We affirm.

As the parties are familiar with the facts, we do not repeat them here. In his first three claims, Meier alleged that the Veterans Administration breached its fiduciary duty and acted negligently by failing to secure informed consent before each colonoscopy procedure. The district court dismissed the claims for judgment on partial findings. The court concluded, and we agree, that under the standard in *Cobbs v. Grant,* 8 Cal. 3d 229 (Cal. 1972), the VA did not fail to secure informed consent. Meier did not establish that he could recover based on non-disclosure of various potential complications that might arise from emergency surgery to repair a perforation suffered during a colonoscopy, particularly when none of those undisclosed

complications materialized. *See Warren v. Schecter,* 57 Cal. App. 4th 1189, 1203-04 (Cal. Ct. App. 1997). Meier also failed to demonstrate that the VA had a duty to disclose Dr. Cheung's professional medical history when he did not present evidence establishing skilled practitioners of good standing would have done so and when, in its settlement agreement, the California Medical Board had not required Dr. Cheung to disclose that information to patients. *See Arato v. Avedon,* 5 Cal. 4th 1172, 1191 (Cal. 1993).

In his fourth and fifth claims, Meier alleged failure to exercise reasonable care in selecting, hiring and retaining Dr. Cheung and failure to properly train, supervise and monitor him. To establish jurisdiction under the FTCA, Meier must show that the VA would be liable under California law if it were a private "person." 28 U.S.C. §§ 1346(b), 2674; *FDIC v. Meyer,* 510 U.S. 471, 478 (1994). The district court correctly concluded that under *Adams v. United States,* 420 F.3d 1049 (9th Cir. 2005), for purposes of the FTCA, "persons" does not include corporate entities. These claims were properly dismissed.

Meier's sixth claim alleged failure to develop and enforce adequate policies to deal with medical emergencies. Although Meier is able to point to a basis under California law for individual liability in negligent administration of emergency services, *see* California Health and Safety Code Section 1799.110(a) ("Health Code"), he did not provide support for liability for development of policies related to emergency services.

The district court properly dismissed Claim Six for lack of jurisdiction.

In his seventh claim, Meier alleged failure to provide competent peer review. Meier highlights several statutory provisions related to medical peer review, *see* California Business and Professional Code Sections 805-809 ("Business Code"), but none provide for tort liability, and Meier does not offer another basis. Claim Seven was correctly dismissed for lack of jurisdiction.

Meier's eighth and ninth claims allege failure to maintain and produce medical records and failure to answer questions regarding treatment. For support, Meier refers to Health Code Sections 123100 and following, as well as Business Code Sections 2262, 2266 and 2282; those provisions, and the cases interpreting them, do not establish individual tort liability for emotional distress damages related to failure to produce medical records or failure to answer patient questions. The district court properly dismissed Claims Eight and Nine for lack of jurisdiction.

In his tenth and final claim, Meier alleged the VA invaded his privacy by overproducing medical records in response to his requests for production and by permitting VA staff to view the records when he had not authorized them to do so. *Hill v. National Collegiate Athletic Association* recognized that the right to privacy guaranteed under the California Constitution gives rise to tort liability. 7 Cal. 4th 1, 39-40 (Cal. 1994). The district court correctly concluded that, while Meier had a legally protected privacy interest, he failed to

establish the other elements of the *Hill* test for invasions of privacy: In the context of his requests for production Meier had no reasonable expectation of privacy in an alleged overproduction of documents to himself, and any such production would not constitute a "serious invasion of privacy." *See id.* The court further determined that Meier pointed to no facts supporting an inference his records were produced to anyone else in violation of his right to privacy. The evidence does not establish VA personnel were exposed to Meier's records beyond what was reasonably required to respond to his requests. Summary judgment was correctly granted on Claim Ten, as there was no genuine issue of material fact regarding whether Meier's privacy was invaded.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN
DISTRICT OF CALIFORNIA

TERRY L. MEIER,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant. /

No. C 05-04404 WHA

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT

(Filed Dec. 22, 2006)

INTRODUCTION

In this tort action against the United States, the government has filed an omnibus motion for summary judgment as to all ten claims in the complaint. Plaintiff Terry Meier, representing himself, alleges various types of misconduct by the Veterans Administration in connection with a series of colonoscopies he underwent between 2002 and 2003. For the reasons stated below, only Claims One, Two, and Three, which allege a failure to secure Meier's informed consent, survive the government's motion. Accordingly, the government's motion is **GRANTED IN PART** and **DENIED IN PART.**

STATEMENT

The following material facts are not in dispute. Meier's suit arises out of three colonoscopy procedures on September 17, 2002, December 19, 2002, and June

23, 2003, at a Veterans Administration Outpatient Clinic in Martinez, California. Each of the procedures was conducted by Dr. Eddie Cheung (Compl. ¶¶ 16-29).

Meier met with Dr. Cheung before and after each colonoscopy. During the meetings, treatment options and progress were discussed. Before each procedure Meier signed a one-page "Request for Administration of Anesthesia and for Performance of Operations and Other Procedures" form, which included a warning that "possible problems" from a colonoscopy could include "bleeding, a hole through the bowel wall (perforation), infections, drug reactions, strain on the heart or lungs, or death" (Caston Exhs. H-U; Nov. 16 Dowling Exh. A at 223).

After the first procedure, Dr. Cheung met with Meier. Cheung informed Meier that a rectal lesion that had been partially removed during the procedure was determined to be a tubulovillous adenoma. Dr. Cheung told Meier of two treatment options for removing the lesion: surgery or a repeat colonoscopy. Dr. Cheung also told Meier about some of the potential consequences of both options, including the risk of perforation during another colonoscopy. Meier did not want to undergo surgery and chose to have another colonoscopy (Nov. 16 Dowling Exh. A at 134-136, 223; Dec. 7 Dowling Exh. C at 292; Caston Exh. L).

During the second colonscopy on December 19, 2002, unbeknownst to Meier (and apparently Dr. Cheung), Meier's cecum was perforated. He was

discharged from the clinic and allowed to return home. Early the next morning, he began experiencing "very sharp abdominal pains." Meier's December 19 discharge sheet indicated that if he felt "severe abdominal pain," he should "go to the nearest hospital or dial 911." Handwritten on the discharge sheet was a number for "ER Mather," the phone number for Mather Air Force Base in Mather, California.

Throughout the day, Meier took taking pain pills that would "knock [him] out." In the afternoon, Meier called the 1-800 number for the VA's Oakland Outpatient Clinic. He did not speak to anyone but left a message. He then called the number on his discharge sheet for Mather Air Force Base. He explained his problem to the person who answered the phone, who told him to wait for a call back. According to Meier, he never received a return phone call. He concedes that he did not call any of the phone numbers again.

After about five hours of waiting, Meier called a friend and asked her to take him to the emergency room. Emergency surgery was required to repair the perforation (Meier Exh. 10; Nov. 16 Dowling Exh. A at 242, 247, 250-51; Compl. ¶ 22).

Meier underwent a third colonoscopy on June 23, 2003. Meier does not allege that any medical complications arose following that procedure.

Meier's complaint asserts ten claims against the government under the Federal Tort Claims Act. Claims One through Three allege a failure to obtain Meier's informed consent prior to the colonoscopies. Claim

Four alleges negligent hiring of Dr. Cheung. Claim Five alleges a failure to train and supervise Dr. Cheung. Claim Six alleges a failure to create policies for responding to medical emergencies. Claim Seven alleges a failure to provide peer review. Claim Eight alleges a failure to produce medical records. Claim Nine alleges a failure to answer Meier's questions concerning care. Claim Ten alleges unauthorized publication of medical records. Meier seeks recovery only for emotional damages that he alleges he suffered as a result of the VA's conduct and for no other form of recovery.

This case was filed in October 2005. An attorney, Meier has represented himself in all proceedings.[1] Between May and November 2006, the parties made numerous applications regarding various discovery-related problems, most of them initiated by Meier. Over that period, the Court held three hearings and issued thirteen orders ruling on all the discovery disputes. In one particularly noteworthy dispute, Meier refused to submit to an independent medical evaluation even though he had placed his mental condition at issue by seeking emotional-distress damages. Meier was ordered to submit to the IME, but refused. He petitioned for a writ of mandamus and sought a stay

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[1] The State Bar of California's website indicates that Meier is "inactive."

of the order before the Ninth Circuit, which denied his requests.[2]

The government now moves for summary judgment on all of Meier's claims.

ANALYSIS

1. Jurisdiction To Consider Meier's Claims Under The FTCA.

The FTCA is a limited waiver of the United States' sovereign immunity. It covers tort claims arising out of the conduct of a government employee acting within the scope of his or her employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1)."Sovereign immunity is jurisdictional in nature. Indeed, the terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994).

The Supreme Court has "consistently held that § 1346(b)'s reference to the 'law of the place' means law of the State – the source of substantive liability under the FTCA." The tort liability alleged by a plaintiff must "arise from state statutory or decisional

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[2] During the mandamus proceeding, Meier was represented by an attorney. Meier has continued to represent himself in the district court after the appeal.

law." *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1026 (9th Cir. 2001). That state law "must impose on the defendants a duty to refrain from committing the sort of wrong alleged here." Each of Meier's claims under the FTCA will only be valid if the claim would be valid under California law. *See Molzof v. United States*, 502 U.S. 301, 305 (1992) ("[T]he extent of the United States' liability under the FTCA is generally determined by reference to state law.").

As the government points out, a plaintiff bringing suit in federal court has the burden of demonstrating that subject-matter jurisdiction exists. *See Tosco v. Comtys. for a Better Env't*, 236 F.3d 495, 496 (9th Cir. 2001). The government contends that this Court lacks jurisdiction under the FTCA because Meier's claims are either not violations of California tort law or are not covered by the FTCA.

As explained below, this Court lacks jurisdiction to adjudicate most of Meier's claims because he does not meet the threshold requirement of the FTCA that "United States, if a private person, would be liable to [Meier] in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). This order holds that some of Meier's claims, as pled, may be considered by this Court pursuant to the FTCA. For those claims, Meier has cited – or the Court has found – decisional or statutory authority supporting claims of liability for similar conduct by private persons in California. For the remainder of his claims, however, Meier has not established that a private person would be liable under those theories in

California. Because the Court lacks jurisdiction to hear those claims pursuant to the FTCA, the government's motion for summary judgment as to those claims must be granted.

A. Claims One Through Three.

The first three claims in Meier's complaint allege that he was given insufficient information to inform his consent to the colonoscopies. Failure to provide sufficient information to support informed consent is a valid claim under California law. Meier cites an on-point California Court of Appeal decision: "A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment." *Berkey v. Anderson*, 1 Cal. App. 3d 790, 803-04 (1969). The California Supreme Court has held that failure to disclose inherent risks of a consented-to medical procedure constitutes negligence by the physician. *See Cobbs v. Grant*, 8 Cal. 3d 229, 240-41 (1972). Because failure to obtain a patient's informed consent is a valid claim under California law, the government may be sued under the FTCA on Claims One through Three.

B. Claims Four and Five.

At first glance, Meier's fourth and fifth claims – alleging negligent hiring, training, and supervision of Dr. Cheung – appear to be valid claims under state law. Meier relies on *Elam v. College Park Hospital*,

132 Cal. App. 3d 332, 340-41 (1982), which held that "as a general principle, a hospital's failure to insure the competence of its medical staff through careful selection and review creates an unreasonable risk of harm to its patients." Accordingly, the *Elam* court held that "a hospital may be held liable to a patient under the doctrine of corporate negligence." *Id.* at 346.

The problem for Meier on these claims lies in the FTCA's plain language. The government's sovereign immunity is only waived "where the United States, *if a private person,* would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (emphasis added). The language of the statute is clear that the government may only be sued where an individual *person* would be liable under state tort law. In a different context, the Ninth Circuit has held that with respect to the FTCA, the word "'persons' . . . does not include corporations." *Adams v. United States,* 420 F.3d 1049, 1050 (9th Cir. 2005) (noting that "[t]he purpose of the FTCA also indicates that 'persons' is limited to individuals"). Thus, the government will not be liable under the FTCA when a plaintiff's claim is based on state law that would only hold a corporation – and not an individual person – liable.

With respect to the case at bar, *Elam* only found that a hospital could be sued for failing to ensure the competence of its employees under a *corporate* negligence theory. *See Elam,* 132 Cal. App. 3d at 338 n.5 (noting that "'corporate negligence' has been

commonly used to describe hospital liability predicated . . . upon its violation of a duty – as a corporation – owed directly to the patient which resulted in injury"). Meier has not cited – nor can the Court find – any California decision extending a hospital's corporate liability to individual persons. This order holds that because California law does not impose liability on a private person for a hospital's negligent hiring or supervision of medical staff, no liability can be imposed on the government on the theories alleged in Claims Four and Five.[3]

C. Claims Six and Seven.

Conspicuously absent from Meier's opposition to the government's motion is any statutory or decisional law supporting his sixth and seventh claims. These are his claims alleging a failure to ensure that VA employees properly respond to medical emergencies

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[3] Even if a hospital's corporate liability could be extended to individuals, summary judgment would be granted on these claims because Meier has not identified *any* genuine issues of material fact in this record regarding the hiring and supervision of Dr. Cheung. Both sides agree that Dr. Cheung had a disciplinary record and had been sued for malpractice. Those facts alone, however, do not establish that the VA breached a duty of care to Meier by hiring or supervising Dr. Cheung. The VA supervisors were aware of Dr. Cheung's history when they hired him. Meier has pointed to no facts that the VA either did not adhere to its established protocols for background checks when it hired Dr. Cheung or that those protocols were themselves deficient (Dec. 7 Dowling Exh. B at 33-36; Dec. 7 Dowling Exh. D at 275-277).

and a failure to provide legally competent peer review. The Court's independent research has uncovered no statutory or decisional law supporting these theories as they are pled.

Regarding Claim Six, California Health and Safety Code Section 1799.110(a) states: "*In any action for damages involving a claim of negligence against a physician and surgeon arising out of emergency medical services provided in a general acute care hospital emergency department,* the trier of fact shall consider, together with all other relevant matters, the circumstances constituting the emergency, as defined herein, and the degree of care and skill ordinarily exercised by reputable members of the physician and surgeon's profession in the same or similar locality, in like cases, and under similar emergency circumstances." Thus California law expressly contemplates suits against individual physicians for the negligent administration of "emergency medical services."

Claim Six of the complaint, however, does not allege negligent administration of emergency medical care by any physician. Instead, it alleges that the VA failed to: (1) create guidelines dealing with medical emergencies, (2) train VA employees to assist with medical emergencies, and (3) establish policies for identifying and punishing employees who failed to abide by the emergency policies (Compl. ¶ 39). The Court can find no California decision or statute supporting a claim based on a negligent failure to create a *policy* for emergency-response procedures. The potential liability of an individual doctor for

failing to provide adequate emergency medical services is not equivalent to a general failure to create a *policy* regarding emergency medical procedures.

As for Claim Seven, there once again appears to be no basis in California law for individual citizens to sue for a failure to provide competent peer review. There are several provisions in California governing medical peer review. *See* Cal. Bus. & Prof. Code 805-809. But, as with several of Meier's other claims, there is no tort liability in California for an allegedly incompetent peer review. Accordingly, there is no basis for this claim against the United States under the FTCA because there would be no liability "in accordance with the law" of California. 28 U.S.C. 1346(b)(1). The government has not waived its sovereign immunity for Meier's Claims Six and Seven.

D. Claims Eight and Nine.

Claims Eight and Nine of the complaint concern: (1) the maintenance and preservation of Meier's medical records, (2) an alleged failure to give him his unedited medical records, and (3) an alleged failure to respond to his questions regarding the professional background of Dr. Cheung. Meier contends that support for these legal theories can be found in California statutes. Specifically, he quotes from California Health and Safety Code Section 123100, and California Business and Professions Code Sections 2262, 2266, and 2282. This order holds that the torts alleged by

Meier regarding medical records and the failure to respond to questions have no basis in California law.

Health and Safety Code Section 123100 is the introduction to the chapter regarding a patient's right to access health records, and states that every person has a "right to access to complete information respecting his or her condition and care provided." The parameters of the patient's right are embodied in Section 123110, which sets forth, among other things, who may request medical records and what documents must be turned over. Section 123110(i) states that any individual who fails to turn over the necessary documents is "guilty of unprofessional conduct" and may be fined one hundred dollars. Finally, a subsequent provision, Section 123120, states: "Any patient or representative aggrieved by a violation of Section 123110 may, in addition to any other remedy provided by law, bring an action against the health care provider to enforce the obligations prescribed by Section 123110."

Reading the statute, it is *possible* that Section 123120's acknowledgment of "any other remedy provided by law" contemplates tort liability for a negligent failure to turn over medical records. In the Court's view, however, such a reading would be unwarranted. It is important to note here that Meier is not seeking a remedy for any economic or physical harm suffered. Rather, he seeks recovery only for emotional harm. The Court's research has uncovered no California decision holding that an individual doctor can be liable for a patient's *emotional damages*

resulting from a violation of Section 123110. Nor has Meier identified such a decision. Drawing upon a diversity-jurisdiction principle, "[i]n the absence of controlling forum state law, a federal court . . . must use its own best judgment in predicting how the state's highest court would decide the case." *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d 314, 316 (9th Cir. 1980). To the Court, it is highly doubtful that an individual doctor would be liable for emotional damages arising from a negligent failure to turn over medical records. Accordingly, this order holds that the claim alleged by Meier has no basis "in accordance with the law" of California. 28 U.S.C. 1346(b)(1).

For Meier's claims regarding the maintenance of medical records and a failure to answer his questions concerning patient care, he relies on California Business and Professions Code Sections 2262, 2266, and 2282. These statutory provisions govern professional conduct by doctors. For example, Section 2262 states: "Altering or modifying the medical record of any person, with fraudulent intent, or creating any false medical record, with fraudulent intent, *constitutes unprofessional conduct*." Section 2266 states: "The failure of a physician and surgeon to maintain adequate and accurate records relating to the provision of services to their patients *constitutes unprofessional conduct*." Section 2282 provides, in pertinent part: "The regular practice of medicine in a licensed general or specialized hospital having five or more physicians and surgeons on the medical staff, which does not

have rules established by the board of directors thereof to govern the operation of the hospital, which rules include, among other provisions, all the following, *constitutes unprofessional conduct:* . . . (d) Provision that adequate and accurate medical records be prepared and maintained for all patients." The Court has found no California statute or decision holding any individual liable in tort for acts constituting "unprofessional conduct" based on the above-quoted statutory provisions. At most, the relevant statutory provisions appear only to allow action by state agencies charged with regulating the medical profession. *See* Cal. Bus. & Prof. Code 2234 ("The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct."). They do not allow for private claims to be brought against physicians for violations of these provisions.[4]

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[4] At the hearing, Meier cited *Bowman v. McPheeters*, 77 Cal.App.2d 795, 800 (1947), to support his theory that all ten of his claims could be allowed based on a physician's fiduciary duty to a patient. *Bowman* recognized that "[a]s fiduciaries it was the duty of [the defendant physicians] to make a full and fair disclosure to [the patient] of all facts which materially affected his rights and interests." That decision, however, dealt with the physician's duty to disclose as it related to triggering the statute of limitations in accordance with California's discovery rule on fraud claims. *Bowman* is inapposite.

E. Claim Ten.

In Claim Ten, Meier alleges that his right to privacy was violated by an unauthorized disclosure of his medical records. Article I, Section I of the California Constitution states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." This order holds that Claim Ten of the complaint is cognizable under the FTCA under Article I, Section I of the California Constitution.[5]

California courts recognize the tort of invasion of privacy pursuant to the California Constitution. *See Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 39-40 (1994). The privacy provision "is intended to be self-executing, *i.e.*, the constitutional provision, in itself, creates a legal and enforceable right of privacy for every Californian." *Jeffrey H. v. Imai, Tadlock & Keeney*, 85 Cal. App. 4th 345, 353 (2001). Moreover, "the state privacy right protects against invasions of privacy by private citizens as well as the state."

The government relies on *F.D.I.C. v. Meyer*, 510 U.S. 471, 477-78 (1994), for the proposition that "the

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[5] Meier actually contends that *all* of his claims are cognizable under Article I, Section I. It is clear to the Court that none of the other nine claims deal with his right to privacy. Only Claim Ten alleges a violation of the right of privacy under the California Constitution as that right is defined by California courts.

United States simply has not rendered itself liable under [the FTCA] for constitutional tort claims." The Supreme Court's decision in *Meyer,* however, is easily distinguishable because there, the plaintiff sought remedies for a *federal* constitutional violation. The Court reemphasized that the FTCA's "reference to the 'law of the place' means law of the State – the source of substantive liability under the FTCA." Accordingly, where, as here, the claim at issue involves a question of *state* constitutional law, such a claim is cognizable under the FTCA. Indeed, it is recognized that the California constitutional right to privacy "has been repeatedly construed to provide California citizens with privacy protections broader than those recognized by the federal Constitution." *Jeffrey H.,* 85 Cal. App. 4th at 353.

* * *

In sum, this order holds that only Claims One, Two, Three, and Ten appear to be cognizable under the FTCA, although as to the latter (Claim Ten), it must fail on the facts, as shown below. The remaining claims are barred by the FTCA and a lack of California decisional or statutory authority supporting them. By failing to cite to support for many claims in his complaint, Meier has not met his burden of demonstrating that subject-matter jurisdiction exists for those claims. As the Supreme Court has instructed, "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharm. Inc. v. Thompson,* 478 U .S. 804, 809 (1986). This order now considers whether Meier has raised any

genuine issues of material fact as to Claims One, Two, Three, and Ten – the informed-consent and privacy-right claims.

2. WHETHER MEIER HAS ALLEGED ANY GENUINE ISSUES OF MATERIAL FACT.

Under Rule 56, summary judgment is proper where the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." It is not the task of the district court to scour the record in search of a genuine issue of triable fact. The non-moving party has the burden of identifying with reasonable particularity the evidence that precludes summary judgment. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996). A genuine dispute as to a material fact exists if there is sufficient evidence for a reasonable finder of fact to return a verdict for the nonmoving party. On summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986).

In Meier's opposition to the motion for summary judgment, he only has two topics listed under the heading "Genuine Issues of Material Facts." Those two topics are "Informed Consent" and "Emergency Care." A simultaneously filed *declaration* by Meier, however, also includes topic headings of "Ultrasound Delay," "Failure to Answer Questions and Produce Medical Records" and "Privacy Rights Violations." For the reasons discussed above, this order addresses

whether Meier has identified any genuine issues of material fact regarding the informed-consent and privacy-right claims.

A. Informed Consent.

"Liability for negligence under California law requires proof of the following elements: (1) a legal duty of care; (2) a breach of that duty; and (3) causation." *Dimmick v. United States*, No. C 05-0971 PJH, 2006 WL 1310449, at *1 (N.D. Cal. May 12, 2006) (citing *Ann M. v. Pacific Shopping Ctr.*, 6 Cal. 4th 666, 673 (1993)). The California Supreme Court has held: "[W]hen the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, . . . the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information." *Cobbs*, 8 Cal. 3d at 240-41. With respect to the duty's parameters, that court has further explained: "The scope of a physician's duty to disclose is measured by the amount of knowledge a patient needs in order to make an informed choice. All information material to the patient's decision should be given." *Truman v. Thomas*, 27 Cal.3d 285, 291 (1980). Material information "is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure."

Meier does not contend that Dr. Cheung did not inform him of the danger of perforation. Instead, he alleges that Dr. Cheung did not inform him of the potential side effects that could occur in the event of a perforation, including fecal incontinence, bladder complications, a sense of urinary urgency, irregular bowel movements, diarrhea, bladder complications, sexual dysfunction, or permanent colostomy. Meier also contends that, prior to the procedure, Dr. Cheung failed to disclose his medical malpractice history and the fact that Cheung's license was on probation. Meier contends that had he known this information, he never would have consented to the procedures (Opp. 10-11; Meier Decl. ¶¶ 2, 7).

This order holds that, as to materiality of the medical risks, Meier has identified a question of material fact that should be decided by a trier of fact. The government has presented evidence that the risks cited by Meier were described by Dr. Cheung as "very, very very remote" (Dec. 7 Dowling Exh. C at 494-498). But in California, "[t]he scope of the physician's communications to the patient . . . must be measured by the patient's need, and that need is whatever information is material to the decision." *Cobbs,* 8 Cal. 3d at 245. It is plausible that the above-listed complications "would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure." *Truman*, 27 Cal. 3d at 291. This order cannot find as a matter of law that even though the risks were highly unlikely, they would not have been

material to a reasonable patient. Additionally, that Meier signed a document warning of "possible problems" including perforation is not dispositive regarding the sufficiency of the disclosure. *See Quintanilla v. Dunkelman,* 133 Cal. App. 4th 95, 115-16 (2005) (holding that "a signed consent is not entitled to conclusive proof of informed consent").

With respect to Dr. Cheung's duty to disclose his malpractice record, Meier contends that "Dr. Cheung . . . voluntarily surrendered his New York License while he was under investigation on claims of professional misconduct and 'moral unfitness.'" According to Meier, Cheung was also sued twice for wrongful death (Meier Decl. ¶ 7). Although there is little documentation of Dr. Cheung's malpractice history in the record, at oral argument, the government conceded that Dr. Cheung's licence had been placed on probation. Also before performing the colonoscopy on Meier, Dr. Cheung had also been sued for medical malpractice. It is certainly plausible that a physician's malpractice history "would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure." *Truman,* 27 Cal. 3d at 291. The government has cited to no California court decision holding that a physician's malpractice history is not "material" to a plaintiff's decision to undergo a medical procedure. This order declines to decide on the present record and as a matter of law that Dr. Cheung owed no duty to Meier to disclose his

malpractice or disciplinary record. This is another issue for the trier of fact to resolve.

In addition to the duty and breach-of-duty requirements, California law also requires a plaintiff to show causation. "[T]here must be a causal relationship between the physician's failure to inform and the injury to the patient." *Dimmick,* 2006 WL 1310449, at *2. This means that "a prudent person in the plaintiff's position would have declined the procedure if adequately informed of the risks." *Warren v. Schecter,* 57 Cal. App. 4th 1189, 1206 (1997). Causation is evaluated under an objective standard, "which in effect equates the plaintiff with a reasonable person [and] protects the defendant-physician from the self-serving testimony of a plaintiff who inevitably will assert at trial that he or she would have refused the procedure if duly advised of the risk."Meier has, of course, stated that he would not have consented to the colonoscopies had he known either about the potential complications or about Dr. Cheung's malpractice history. The government has not provided any evidence to rebut his claim, other than to note that the chances of the complications were remote. This order declines to find as a matter of law that a reasonable person in Meier's position, having been told the information Meier now claims he was entitled to, also would have chosen to proceed with the colonoscopies. This is a matter for the trier of fact.

This order should not be construed as a positive declaration that the government was obligated to

disclose the items in question. It only holds that the question is one that deserves a trial.

2. Privacy Right Violation.

Above, this order found that California recognizes an individual's right to sue for an invasion of privacy by another person. In *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 39-40 (1994), the California Supreme Court established an analytical framework for evaluating a claim for invasion of privacy. "[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy."

With respect to his medical records, Meier satisfies the first prong of the test. "[I]t has long been recognized that the zones of privacy created by article I, section I [of the California Constitution], extend to the details of one's medical history." *Jeffrey H.*, 85 Cal. App. 4th at 353 (internal quotations omitted). But Meier's claim has no merit on the other two prongs.

From what can be discerned from Meier's declaration, he is alleging an unauthorized disclosure of medical records, specifically his HIV-test results, *to himself* (Meier Decl. ¶ 26). Prior to this litigation, Meier made numerous written requests to the VA to provide him with, for example, "all documents and

printouts of all computer entries . . . relating, in any fashion, to: . . . [his] December 19, 2002 colonoscopy and/or its complications." He also included an instruction to "PRODUCE EVERYTHING! WITHOUT EXCEPTION!!!" (Caston Exh. C). Meier contends that the VA *over* produced his medical history to him when it provided him with sixteen years of his medical records, including HIV-test results. Meier has pointed to no facts supporting any inference that the medical records were disclosed to anyone else in violation of his right to privacy.

This order holds that "in the circumstances" of Meier's request, he had no expectation of privacy in his medical records because he was demanding that they be disclosed to him. No court would conclude that there was an invasion of privacy when Meier was provided with his own medical records. In the same vein, it would be impossible for any reasonable person to conclude that the VA had engaged in a "serious invasion of [Meier's] privacy" by turning over his medical records to him, even if those records were not the particular documents he requested. Meier has no claim for invasion of privacy against the government.

CONCLUSION

For the foregoing reasons, the government's motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**. Trial will be limited to the issue of whether Dr. Cheung failed to obtain Meier's

informed consent when he did not inform Meier of: (1) various medical risks that may have arisen as a result of the colonoscopies, or (2) Dr. Cheung's medical malpractice and disciplinary history.

Meier also filed twenty-one pages of evidentiary objections to the government's declarations and exhibits. Meier objects to the deposition transcripts filed by the government because they lacked certifications signed by the reporters. *See Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774 (9th Cir. 2002). The government filed the proper certifications following oral argument on the instant motion. Meier's objection to those declarations is **OVERRULED**. The only exhibits objected to by Meier and relied on by this order were the exhibits attached to Shannon Caston's declaration. Meier's objections to these exhibits as hearsay, speculation, and opinion testimony of a lay witness are **OVERRULED**. In any event, those documents have not been relied on for their truth to rule against Meier. The remainder of his objections are **OVERRULED** as moot. Finally, Meier's request for judicial notice that his perforated colon caused pain and suffering is **DENIED**.

IT IS SO ORDERED.

Dated: December 22, 2006

/s/ Wm Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE
HONORABLE WILLIAM ALSUP, JUDGE

TERRY L. MEIER,

PLAINTIFF,

VS.

UNITED STATES OF AMERICA,

DEFENDANT.

NO. C-05-4404 WHA

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SAN FRANCISCO, CALIFORNIA
THURSDAY, FEBRUARY 8, 2007

TRANSCRIPT OF PROCEEDINGS

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COMPUTERIZED
TRANSCRIPTION BY ECLIPSE

* * *

[622] THE COURT: ALL RIGHT. BACK ON THE RECORD, IN OUR CASE OF MR. MEIER VERSUS USA.

THE COURT IS NOW GOING TO RULE ON THE RECORD. IT'S GOING TO TAKE A WHILE. I AM WORKING OFF MY NOTES. PLEASE DON'T INTERRUPT. AND WHAT I'VE DONE, I THINK IT WILL BE CLEAR WHAT THE COURT'S RULING IS.

THE COURT HAS MADE – IS NOW MAKING AN ORDER UNDER RULE 52(C) FOR JUDGMENT IN FAVOR OF THE UNITED STATES IN THIS CASE, BASED ON THE GOVERNMENT'S MOTION AT THE END OF THE PLAINTIFF'S CASE. THERE IS NO DUTY TO MAKE FINDINGS ON EACH AND EVERY ISSUE AND SUBISSUE AND SUB-SUBISSUE THAT HAS BEEN ANIMATING THIS LENGTHY AND HIGHLY CONTENTIOUS LITIGATION. BUT THE COURT IS GOING TO MAKE FINDINGS ON THE KEY POINTS THAT ARE AT ISSUE IN THE CASE, AND WHICH THE COURT FEELS IS DISPOSITIVE, AFTER HAVING CAREFULLY CONSIDERED MR. MEIER'S CASE IN CHIEF.

THIS ACTION ARISES OUT OF A SERIES OF COLONOSCOPIES CONDUCTED BY A VA DOCTOR. NO ONE DIED, FORTUNATELY, AND NO ONE INCURRED ANY LONG-TERM INJURY. BUT PLAINTIFF SUFFERED SOME EXCRUCIATING PAIN, WHICH IN TURN HAS PROVOKED THIS LAWSUIT.

[623] MR. MEIER, TERRY MEIER, IS A VETERAN, HE'S AN INACTIVE LAWYER, HAVING RETIRED. HE'S IN HIS MID-FIFTIES.

MR. METER: I'M SIXTY, YOUR HONOR.

THE COURT: MR. MEIER, I MUST ASK YOU NOT TO INTERRUPT THE COURT WHILE THE COURT IS GIVING ITS RULING, IF I'M IN ERROR ON YOUR AGE. I THOUGHT YOU SAID 56, BUT PLEASE DON'T INTERRUPT ME AGAIN.

MR. MEIER UNDERWENT THREE COLONOSCOPIES, STARTING SEPTEMBER 17, 2002, ENDING ON JUNE 24, 2003. THE ONE IN THE MIDDLE WAS DECEMBER 19, 2002. THESE WERE DONE AT THE VETERANS ADMINISTRATION OUTPATIENT CLINIC IN MARTINEZ. EACH WAS CONDUCTED BY A DOCTOR NAMED DR. EDDIE CHEUNG, C-H-E-U-N-G.

MEIER MET WITH DR. CHEUNG BEFORE AND AFTER EACH COLONOSCOPY. DURING THE MEETINGS, TREATMENT OPTIONS AND PROGRESS WERE DISCUSSED. BEFORE EACH PROCEDURE, MEIER SIGNED A ONE-PAGE

REQUEST FOR ADMINISTRATION OF ANESTHESIA AND FOR PERFORMANCE OF OPERATIONS AND OTHER PROCEDURES FORM, WHICH INCLUDED A WARNING OF POSSIBLE PROBLEMS FROM THE – FROM A COLONOSCOPY.

THESE POSSIBLE PROBLEMS INCLUDED – INCLUDED BLEEDING, A HOLE THROUGH THE BOWEL WALL PERFORATION, INFECTIONS, DRUG REACTIONS, STRAIN ON THE HEART OR LUNGS, OR DEATH. ONE EXAMPLE OF THESE FORMS CAN BE FOUND AT TRIAL EXHIBIT 9.

AFTER THE FIRST PROCEDURE, DR. CHEUNG MET WITH MR. MEIER. QUITE A NUMBER OF POLYPS HAD BEEN DISCOVERED IN HIS [624] INTESTINE. SOME HAD BEEN REMOVED. DR. CHEUNG INFORMED MEIER THAT A RECTAL LESION OF APPROXIMATELY 20 – JUST ONE MOMENT.

SOMEBODY IS OUT THERE MAKING NOISE. PLEASE LEAVE THE ROOM OR BE QUIET. NOW, THIS CASE IS IMPORTANT TO MR. MEIER AND THE GOVERNMENT. SOME DAY YOUR CASE IS GOING TO BE IMPORTANT. IF YOU DON'T WANT TO BE QUIET, LEAVE.

AFTER THE FIRST PROCEDURE, DR. CHEUNG MET WITH MR. MEIER. QUITE A NUMBER OF POLYPS HAD BEEN IDENTIFIED IN HIS INTESTINE, AND SOME OF THEM HAD BEEN REMOVED. DR. CHEUNG INFORMED MR. MEIER THAT A RECTAL LESION OF ABOUT 25

MILLIMETERS HAD BEEN PARTIALLY REMOVED DURING THE PROCEDURE. THIS WAS AN ABNORMALLY LARGE LESION. IT WAS DETERMINED TO BE A TUBULOVILLOUS – T-U-B-U-L-O-V-I-L-L-O-U-S – ADENOMA. IT PROVED NOT TO BE CANCEROUS, BUT THE PROBLEM WAS THAT IT COULD DEVELOP INTO CANCER. AND DR. CHEUNG URGED THAT IT BE TREATED.

DR. CHEUNG TOLD MR. MEIER TWO TREATMENT OPTIONS. ONE WAS SURGICAL RESECTION OF THE POLYP. THIS WOULD BE SURGERY DONE BY A SURGEON. THE SECOND WAS FOR DR. CHEUNG, HIMSELF, TO DO A REPEAT COLONOSCOPY. THE REPEAT COLONOSCOPY WOULD NOT HAVE COMPLETELY REMOVED THE POLYP, BUT WOULD HAVE REDUCED ITS SIZE.

DR. CHEUNG TOLD MEIER ABOUT SOME OF THE POTENTIAL CONSEQUENCES OF A REPEAT COLONOSCOPY, INCLUDING THE RISK OF PERFORATION DURING YET ANOTHER COLONOSCOPY. AND SPECIFICALLY, THEY DISCUSSED THE RISK OF IF THERE WAS A PERFORATION, THAT THERE WOULD HAVE TO BE SURGERY POSSIBLY TO FIX IT.

[625] NOW, THIS SURGERY SHOULD NOT BE CONFUSED WITH THE SURGERY FOR THE – THE SURGICAL RESECTION OF THE POLYP. WE'RE TALKING NOW ABOUT TWO DIFFERENT

TYPES OF SURGERY. THE SURGERY TO FIX THE PERFORATION OF THE INTESTINE WOULD BE DIFFERENT. THAT WOULD BE REMEDIAL IN THE EVENT THAT A PERFORATION OCCURRED.

BUT IN ANY EVENT, MR. MEIER STATED TO DR. CHEUNG AS HE STATED HERE AT THE TRIAL, THAT HE HAD HAD SURGERY TOO MANY TIMES IN HIS LIFE, AND THERE WAS NO WAY HE WAS GOING TO GO THROUGH YET ANOTHER SURGERY. AND HE TOOK THAT OPTION OFF THE TABLE. SO MR. MEIER CHOSE TO HAVE ANOTHER COLONOSCOPY.

NOW, THE SECOND COLONOSCOPY WAS ON DECEMBER 19TH, 2002. UNBEKNOWNST TO MEIER AND ALSO TO DR. CHEUNG AT THE TIME, MEIER'S CECUM – C-E-C-U-M – WAS IN FACT PERFORATED DURING THIS PERFORATION, OR AT LEAST THE WALL OF THE CECUM WAS WEAKENED TO THE POINT THAT IT LATER PERFORATED, SHORTLY AFTER THE SURGERY – SORRY, AFTER THE COLONOSCOPY.

HE WAS DISCHARGED FROM THE CLINIC, AND ALLOWED TO RETURN HOME. EARLY THE NEXT MORNING, HE BEGAN EXPERIENCING VERY SHARP ABDOMINAL PAINS. ON HIS DISCHARGE SHEET FROM THE COLONOSCOPY, IT INDICATED THAT IF HE FELT PAIN, THAT HE SHOULD GO TO THE NEAREST HOSPITAL OR DIAL 911. THERE WAS ALSO A HAND-WRITTEN

PHONE NUMBER ON THERE, AN 800 NUMBER FOR EMERGENCY.

AND DURING THE DAY IT GOT WORSE AND WORSE. AND IN THE AFTERNOON, IN GREAT PAIN, MR. MEIER CALLED THE 800 NUMBER. AND DID NOT GET SATISFACTORY RESULTS, BUT EVENTUALLY SOMEONE CALLED [626] BACK. AND AS THINGS DETERIORATED MORE AND MORE, FINALLY MR. MEIER GOT AHOLD OF MS. KAZMAIER, HIS FORMER GIRLFRIEND, STILL A FRIEND. AND, ASKED MS. KAZMAIER TO TAKE HIM TO THE EMERGENCY ROOM AT HIGHLAND HOSPITAL. MS. KAZMAIER TESTIFIED, AND EVERYONE SHOULD HAVE A FRIEND LIKE HER. SHE WAS A TRUE ANGEL OF MERCY IN THIS CASE. SHE CAME AND TOOK MR. MEIER TO THE HOSPITAL.

EMERGENCY SURGERY WAS REQUIRED TO PERFORM THE – TO REPAIR THE PERFORATION. THIS RESULTED IN FRANKENSTEIN-TYPE INCISIONS, AND STITCHES ALL UP AND DOWN HIS STOMACH AND SIDE. HE WAS IN THE HOSPITAL FOR TEN DAYS, RECOVERING. HE TESTIFIED TO THE PAIN AND THE WEAKNESS AND THE LOSS OF WEIGHT, AND ALL THAT IS ENTIRELY CREDIBLE, AND THE COURT ACCEPTS THAT. THERE'S NO DOUBT THAT MR. MEIER WENT THROUGH EXCRUCIATING PAIN, BOTH BEFORE AND AFTER THAT REMEDIAL SURGERY.

NOW, THE NEXT MEETING THAT OCCURRED WITH DR. CHEUNG, I'M GOING TO COME TO IN A MOMENT, BUT TO SKIP AHEAD, HE UNDERWENT A THIRD COLONOSCOPY IN JUNE, 2003. MORE POLYPS WERE REMOVED AT THAT TIME, BUT THERE WAS NO MEDICAL COMPLICATIONS THAT AROSE FOLLOWING THAT PROCEDURE.

THIS CASE WAS FILED IN OCTOBER, 2005. AS AN ATTORNEY, MR. MEIER'S REPRESENTED HIMSELF IN ALL THE PROCEEDINGS. BY SUMMARY JUDGMENT ORDER, HOWEVER, ALL CLAIMS WERE DISMISSED EXCEPT THOSE BASED ON AN ALLEGED FAILURE TO OBTAIN INFORMED CONSENT, MEANING, RAISING THE QUESTION OF WHETHER OR NOT [627] ADEQUATE DISCLOSURE HAD BEEN MADE.

IT IS FAIR TO SAY THAT MR. MEIER IS VERY BITTER AND ANGRY AT THE VETERANS ADMINISTRATION AND AT DR. CHEUNG. AND, SOMETIMES THAT ANGER AND BITTERNESS HAS ANIMATED HIS CONDUCT IN THIS CASE. MR. MEIER CLAIMS THAT DR. CHEUNG SHOULD HAVE DISCLOSED MORE RISKS THAN HE DID BEFORE THE FIRST AND THE SECOND COLONOSCOPY. AND THE THIRD, FOR THAT MATTER.

THE – THE THINGS THAT HE SAYS THAT SHOULD HAVE BEEN DISCLOSED ARE WHAT I'LL CALL THE SIX ITEMS. I'LL COME TO THOSE

IN A MINUTE. BUT TO PUT THEM IN CONTEXT, THE SIX ITEMS ARE PHYSICAL COMPLICATIONS THAT CAN ARISE IN THE EVENT THAT SURGERY IS NECESSARY TO FIX A PERFORATION, ASSUMING THAT A PERFORATION OCCURS IN THE FIRST PLACE DURING THE COLONOSCOPY.

NOW, THE RISK OF A PERFORATION IS SLIGHT. DR. CHEUNG SAID THAT HE HAD INCURRED THREE OUT OF SOME – MORE THAN 1,000 COLONOSCOPIES. SO IT'S A SLIGHT RISK. AND THEN, IF SURGERY IS REQUIRED TO FIX THE PERFORATION, THESE SIX ITEMS ARE COMPLICATIONS THAT ARE MORE THEORETICAL THAN REAL, THAT COULD OCCUR IN THE COURSE OF THAT REMEDIAL SURGERY. OR AS A RESULT OF THE REMEDIAL SURGERY.

NOW, MR. MEIER HAS CANDIDLY ADMITTED – AND THE COURT APPRECIATES HIS CANDOR IN THIS RESPECT, HE'S CANDIDLY ADMITTED THAT THE RISK THAT FOLLOW-ON SURGERY MIGHT BE REQUIRED WAS IN FACT DISCUSSED, JUST LIKE THE RISK OF PERFORATION WAS DISCUSSED. AND HE ACKNOWLEDGES THAT, AND MAKES NO CLAIM THAT THERE WAS ANY [628] SHORTFALL ON THOSE DISCLOSURES.

WHAT MR. MEIER SAYS WAS NOT DISCLOSED WAS THIS POSSIBLE SET OF COMPLICATIONS FROM ANY REMEDIAL SURGERY FOLLOWING ANY PERFORATION. BUT IT'S

IMPORTANT TO STRESS MANY TIMES THAT NONE OF THESE COMPLICATIONS HAVE EVER BEEN EXPERIENCED BY MR. MEIER. THEY ARE ALL THEORETICAL ON THIS RECORD.

HERE THEY ARE. NUMBER ONE, FECAL INCONTINENCE. TWO, SEXUAL IMPOTENCE. THREE, URINARY URGENCY. FOUR, COLOMOSCOPY BAG. I DIDN'T SAY THAT RIGHT, BUT YOU KNOW WHAT I MEAN. FIVE, BLADDER COMPLICATIONS. SIX, DIARRHEA.

IT SHOULD BE SAID THAT MR. MEIER TESTIFIED THAT HE HAD EXPERIENCED URINARY URGENCY BUT CANDIDLY ADMITTED HE COULD NOT ATTRIBUTE IT TO ANYTHING OTHER THAN ADVANCING AGE. ALL OF THE OTHER SIDE EFFECTS HE HAS NOT EXPERIENCED, MUCH LESS BLAMED ON THE SURGERY.

AND AGAIN, THE COURT APPRECIATES MR. MEIER'S CANDIDNESS AND CANDOR IN NOT ATTEMPTING TO MAKE UP A STORY THAT HE IS BLAMING ANY OF THESE THINGS ON HIS PROCEDURE. HE DOES NOT. RATHER, HE HAS A DIFFERENT POINT.

AND HIS DIFFERENT POINT IS THAT HAD HE KNOWN THAT THESE WERE THEORETICAL POSSIBILITIES, HE WOULD HAVE REJECTED EVEN THE COLONOSCOPY, AND UNDERGONE NO PROCEDURE WHATEVER, AND LIVED OUT

HIS REMAINING YEARS WITH POLYPS GROWING INSIDE HIS INTESTINE.

[629] THE VA RESPONDS THAT MR. MEIER CANNOT SUE OVER THESE COMPLICATIONS BECAUSE HE'S NEVER EXPERIENCED THEM, AND MUCH LESS, ATTRIBUTE THEM TO THE COLONOSCOPY OR THE REMEDIAL SURGERY. THERE IS NO POINT IN CASE LAW EXACTLY ON POINT.

BOTH SIDES, HOWEVER, AGREE THAT THE STANDARD FOR DISCLOSURE IS GOVERNED BY CALIFORNIA LAW. AND THE KEY CASE IS COBBS V. GRANT, A 1972 DECISION BY THE CAL SUPREME COURT AT 8 CAL.3D, 229.

AND THAT COURT HELD, AND I'M QUOTING NOW, "AS AN INTEGRAL PART OF THE PHYSICIAN'S OVERALL OBLIGATIONS TO THE PATIENT, THERE IS A DUTY OF REASONABLE, DISCLOSURE OF THE AVAILABLE CHOICES WITH RESPECT TO THE PROPOSED THERAPY, AND OF THE DANGERS INHERENTLY AND POTENTIALLY INVOLVED IN EACH."

SKIPPING AHEAD, QUOTE, "A MEDICAL DOCTOR, BEING THE EXPERT, APPRECIATES THE RISKS INHERENT IN THE PROCEDURE HE IS PRESCRIBING, THE RISKS OF A DECISION NOT TO UNDERGO THE TREATMENT, AND THE PROBABILITY OF THE SUCCESSFUL OUTCOME OF THE TREATMENT. ONCE THIS INFORMATION HAS BEEN DISCLOSED, THAT ASPECT OF

THE DOCTOR'S EXPERT FUNCTION HAS BEEN PERFORMED. THE WEIGHING OF THESE RISKS AGAINST THE INDIVIDUAL SUBJECTIVE FEARS AND HOPES OF THE PATIENT IS NOT AN EXPERT SKILL. SUCH EVALUATION AND DECISION IS A NON-MEDICAL JUDGMENT RESERVED TO THE PATIENT, ALONE."

SKIPPING FURTHER AHEAD, "TWO QUALIFICATIONS TO A REQUIREMENT OF FULL DISCLOSURE NEED LITTLE EXPLICATION. FIRST, [630] THE PATIENT'S INTEREST IN INFORMATION DOES NOT EXTEND TO A LENGTHY POLYSYLLABIC DISCOURSE ON ALL POSSIBLE COMPLICATIONS. A MINI-COURSE IN MEDICAL SCIENCE IS NOT REQUIRED. THE PATIENT IS CONCERNED WITH THE RISK OF DEATH OR BODILY HARM AND THE PROBLEMS OF RECUPERATION. SECOND, THERE IS NO PHYSICIAN'S DUTY TO DISCUSS THE RELATIVELY MINOR RISKS INHERENT IN COMMON PROCEDURES, WHEN IT IS COMMON KNOWLEDGE THAT SUCH RISK INHERENT IN THE PROCEDURE ARE OF VERY LOW INCIDENCE."

SKIPPING AHEAD, "WHEN A GIVEN PROCEDURE INHERENTLY INVOLVES A KNOWN RISK OF DEATH OR SERIOUS BODILY HARM, A MEDICAL DOCTOR HAS A DUTY TO DISCLOSE TO HIS PATIENT THE POTENTIAL OF DEATH OR SERIOUS HARM, AND TO EXPLAIN IN LAY TERMS THE COMPLICATIONS THAT MIGHT POSSIBLY OCCUR. BEYOND THE FOREGOING

MINIMAL DISCLOSURE, A DOCTOR MUST ALSO REVEAL TO HIS PATIENT SUCH ADDITIONAL INFORMATION AS A SKILLED PRACTITIONER OF GOOD STANDING WOULD PROVIDE UNDER SIMILAR CIRCUMSTANCES."

THE FINAL QUOTATION IS, SKIPPING A LITTLE FURTHER AHEAD, QUOTE, "THERE MUST BE A CAUSAL RELATIONSHIP BETWEEN THE PHYSICIAN'S FAILURE TO INFORM AND THE INJURY TO THE PLAINTIFF. SUCH CAUSAL CONNECTION ARISES ONLY IF IT IS ESTABLISHED THAT HAD THE REVELATION BEEN MADE, CONSENT TO TREATMENT WOULD NOT HAVE BEEN GIVEN."

SO, THAT'S THE DECISION BY THE CAL SUPREME COURT THAT BOTH SIDES ARE KEEN ON QUOTING TO THE COURT.

THE DISCLOSURE THAT WAS MADE IN THIS CASE, THERE WERE [631] SOME DISCLOSURES ORALLY, BUT IN ADDITION THERE WERE SOME IN WRITING, AND EVEN SIGNED BY MR. MEIER, AND IT'S WORTH REMINDING OURSELVES WHAT THOSE WERE.

THE FORM IN QUESTION, ONE EXAMPLE IS EXHIBIT NO. 9. AND IN UNDERLINED LETTERING, THAT SINGLE-PAGE FORM, JUST ABOVE THE SIGNATURE OF THE PATIENT, DESCRIBED WHAT THE COLONOSCOPY WOULD BE, AND THE ESSENCE OF THE PROCEDURE. AND THEN, PART OF IT SAID, "POSSIBLE

PROBLEMS ARE BLEEDING, A HOLE THROUGH THE BOWEL WALL (PERFORATION), INFECTIONS, DRUG REACTIONS, STRAIN ON THE HEART OR LUNGS, OR DEATH." THAT WAS PROVIDED BEFORE EACH OF THE PROCEDURES.

NOW, ONE KEY LEGAL QUESTION IS WHETHER MR. MEIER CAN SUE FOR THE COMPLICATIONS THAT NEVER MATERIALIZED, OR AT LEAST WHICH HE CANNOT CONTRIBUTE CAUSALLY TO THE SURGERY. BUT AN EVEN MORE PRELIMINARY QUESTION IS WHETHER MEIER HAS EVEN PROVEN THAT THE SIX ITEMS WERE RISKS AT ALL. THAT HE HAS NO MEDICAL EXPERIENCE, AND MEDICAL EXPERTISE, AND THE ONLY EVIDENCE THAT WOULD BE OF EXPERTISE NATURE THAT HE HAS PRESENTED IS THAT OF DR. CHEUNG, HIMSELF. AND DR. CHEUNG'S TESTIMONY STATED VERY CLEARLY THAT THESE WERE VERY, VERY, VERY REMOTE POSSIBILITIES FROM THE REMEDIAL SURGERY, SHOULD THAT PROVE TO BE NECESSARY.

THEREFORE, THE GOVERNMENT IS INCORRECT WHEN IT SAYS THERE'S NO MEDICAL EVIDENCE WHATSOEVER ON THE ISSUE IN PLAINTIFF'S CASE. THERE IS DR. CHEUNG'S TESTIMONY THERE, AND THAT'S ALREADY IN THE PLAINTIFF'S CASE. BUT BY THE SAME TOKEN, [632] THE SAME EVIDENCE IS VERY CLEAR THAT ALL SIX ITEMS WERE VERY, VERY,

VERY REMOTE. AND WOULD HAVE ARISEN – THAT THAT REMOTE POSSIBILITY WOULD HAVE ARISEN IN THE EVENT ONLY THAT THE SURGERY WAS NECESSARY TO FIX ANY PERFORATION, WHICH WAS, IN ITSELF, NOT A VERY FREQUENT EVENT.

GIVEN THE EXTREME REMOTENESS OF THESE COMPLICATIONS, AND GIVEN THAT THEY COULD ONLY BE IN PLAY, EVEN IF REMOTELY, IN THE FURTHER LOW CHANCE OF A PERFORATION, THIS COURT NOW HOLDS THAT THESE RISKS WERE SO ATTENUATED AND SO THEORETICAL THAT THERE WAS NO DUTY TO COMMUNICATE THEM. THEY WERE NOT SIGNIFICANT MEDICAL RISKS IN THE CIRCUMSTANCES OF OUR CASE.

NOW, THAT ALONE WOULD BE SUFFICIENT TO DEAL WITH THIS ISSUE. BUT, THERE IS A ANOTHER FUNDAMENTAL LAPSE IN MR. MEIER'S CASE. THE COURT AGREES WITH THE VA THAT MR. MEIER HAS NO CLAIM TO SUE UNDER CALIFORNIA LAW OVER COMPLICATIONS THAT HAVE NEVER ARISEN AND ARE MERELY THEORETICAL.

THE BETTER VIEW OF THE LAW IN CALIFORNIA – ALTHOUGH ADMITTEDLY IT IS NOT SETTLED, AND MAYBE MR. MEIER WILL GET THIS SETTLED IN HIS APPEAL TO THE NINTH CIRCUIT – BUT THE BETTER VIEW OF THE LAW IS THAT THE PATIENT CAN ONLY SUE

FOR UNCOMMUNICATED HAZARDS THAT DO MATERIALIZE, AND THAT'S THE WAY THE COURT READS WARREN V. SCHECTER. WHILE THAT'S NOT EXACTLY ON POINT, IT'S CLOSE ON POINT.

THERE, THE PLAINTIFF SUED OVER AN UNCOMMUNICATED HAZARD THAT DID ARISE. THE COURT OF APPEAL – AND THAT'S NOT – [633] NO "S," JUST COURT OF APPEAL – SAID THAT THE PATIENT COULD ALSO RECOVER FOR THE COMMUNICATED HAZARDS THAT ALSO MATERIALIZED, EVEN THOUGH THE COMMUNICATED HAZARDS HAD BEEN COMMUNICATED. SIGNIFICANTLY, THE COURT SAID THAT THE PATIENT HAD NO CAUSE OF ACTION UNTIL SHE GOT SOMETHING THAT HAD NOT BEEN COMMUNICATED.

NOW, HERE, PLAINTIFF MEIER HAS NOT EXPERIENCED ANY SIDE EFFECT THAT WAS UNCOMMUNICATED.

ANOTHER POTENTIAL SIDE ISSUE WOULD BE WHETHER OR NOT UNDER THE RUBRIC OF OTHER INFORMATION THAT SOMEONE, A SKILLED PRACTITIONER OF GOOD STANDING WOULD PROVIDE, THAT SOMEHOW THESE SIX ITEMS SHOULD BE DISCLOSED. AND THERE, THERE IS NO MEDICAL TESTIMONY WHATEVER IN THE RECORD, AND THE COURT AGREES WITH THE GOVERNMENT THAT FOR THAT ELEMENT OF THE COBBS STANDARD, EXPERT

TESTIMONY IS REQUIRED. AND THERE IS NO SUCH TESTIMONY IN THIS CASE THAT WOULD ALLOW A FINDING THAT SOMEONE OF – A SKILLED PRACTITIONER OF GOOD STANDING WOULD HAVE GONE TO THE TROUBLE TO POINT OUT THESE SIX REMOTE CONTINGENCIES.

NOW, THE COURT DOES FIND THAT DR. CHEUNG ARGUABLY FAILED IN ONE RESPECT IN HIS DISCLOSURES OF RISKS. HE STRONGLY RECOMMENDED THE RESECTION SURGERY FOR THE POLYP ON AT LEAST TWO OCCASIONS. WHILE HE DID COMMUNICATE THE ADVANTAGES OF THAT – OF SURGERY, HE DID NOT COMMUNICATE THE RISK OF SUCH SURGERY.

HIS EXPLANATION IS THAT THE SURGEON WOULD HAVE DONE SO IN ADVANCE OF THE SURGERY, HAD MR. MEIER BEEN WILLING TO UNDERGO THE SURGERY. THAT IS TO SAY, BEFORE ANY SUCH SURGERY, THE [634] SURGEON WOULD HAVE SAT DOWN WITH MR. MEIER, HAD A CONSULTATION, AND WOULD HAVE POINTED OUT THE PROS AND CONS OF THE SURGERY.

THAT IS TRUE. THAT IS THE WAY IT WOULD HAVE WORKED. BUT, IN THIS COURT'S READING OF THE COBBS DECISION, IT REQUIRED DR. CHEUNG TO DISCLOSE THE PROS AND CONS OF BOTH ALTERNATIVES. IF DR. CHEUNG KNEW ENOUGH ABOUT THE

SURGERY TO RECOMMEND IT, HE SHOULD HAVE KNOWN ENOUGH ABOUT IT TO COMMUNICATE THE DOWN SIDES OF ANY SUCH SURGERY.

OF COURSE, THIS COULD HAVE BEEN LEFT SUBJECT TO MORE DETAILED DISCLOSURES BY THE MORE EXPERT SURGEON. OF COURSE, THAT HAS BEEN TO BE TRUE. BUT AT LEAST A SUMMARY OF THE BASIC RISKS OF THE SURGERY SHOULD HAVE BEEN DISCLOSED AT THE SAME TIME IT WAS SO STRONGLY RECOMMENDED.

HOWEVER, ON THIS RECORD, THERE WAS NO HARM FROM THE NON-DISCLOSURE. THIS IS BECAUSE MEIER REPEATEDLY, REPEATEDLY, REPEATEDLY TOLD CHEUNG, JUST AS HE SAID HERE IN COURT DURING MANY TIMES IN THE TRIAL, THAT HE WOULD NEVER VOLUNTARILY ELECT SURGERY, HAVING HAD SO MANY BAD EXPERIENCES WITH SURGERY IN THE PAST.

SO DURING HIS CONSULTATIONS WITH DR. MEIER – I MEAN DR. CHEUNG, MEIER HAD TAKEN THAT OPTION OFF THE TABLE. IT WAS THEREFORE HARMLESS, IF NOT REASONABLE, FOR DR. CHEUNG TO TRUNCATE HIS DISCUSSION ON TIIIS OPTION.

NOW WE TURN TO A DIFFERENT DISCLOSURE ISSUE, AND THAT IS WHETHER OR NOT DR. CHEUNG HAD A DUTY TO DISCLOSE CERTAIN [635] ASPECTS OF HIS

PROFESSIONAL BACKGROUND. DR. CHEUNG WAS SUED DURING THE 1980s, TWO TIMES. IN 1989 HE WAS SUED IN THE CHIN CASE, INVOLVING A SURGERY THAT WENT BAD. THAT CASE WAS SETTLED FOR $29,999, WHICH WAS ONE DOLLAR BELOW THE AMOUNT THAT WOULD HAVE MADE IT REPORTABLE TO THE STATE MEDICAL BOARD. THE SECOND CASE WAS A – THE LLARENA CASE, ALSO IN 1989, BROUGHT BY A PRO SE PERSON. THAT WAS PROMPTLY DISMISSED, AND THE PLAINTIFF WAS SANCTIONED. THAT CASE NEVER WENT ANYWHERE. THOSE WERE THE ONLY TWO INCIDENCES.

NOW, THAT'S CHAPTER ONE. CHAPTER TWO OF THE HISTORY WAS THAT IN APPLYING FOR HOSPITAL PRIVILEGES AT THREE HOSPITALS, DR. CHEUNG STATED THAT HE HAD NOT BEEN SUED FOR MALPRACTICE. NOW, THIS WAS INCORRECT. HE WAS. HE HAD BEEN SUED, THAT'S THE – THAT'S THE CHIN CASE. SO THAT HE TOLD THREE HOSPITALS SOMETHING THAT WAS INCORRECT. NOW, HE TESTIFIED HERE THAT HE THOUGHT HE HAD NO DUTY TO DISCLOSE, SINCE IT WAS UNDER THE $30,000 THRESHOLD. THAT WAS INCORRECT. HE WAS MISINFORMED, IF THAT'S WHAT SOMEBODY TOLD HIM.

IN THIS CASE, THE COURT AGREES WITH MR. MEIER TO THIS EXTENT, THAT HE'S RIGHT TO HAVE BEEN CONCERNED OVER THIS

HISTORY. IT'S NOT A VERY GOOD HISTORY FOR DR. CHEUNG, AND HOW HE DEALT WITH THOSE – WITH THOSE HOSPITALS.

BUT HERE IS THE PART THAT MR. MEIER CONSTANTLY OVERLOOKS. ALL OF THIS WAS BROUGHT TO THE ATTENTION OF THE STATE MEDICAL BOARD. EVERYTHING, THE CHIN CASE, THE THREE [636] HOSPITALS, THE WAY HE ANSWERED THOSE QUESTIONS. AND THE STATE MEDICAL BOARD CONDUCTED A FULL INVESTIGATION, AND THEY LEARNED – AND THEY KNEW ALL THE FACTS, AND THEY DECIDED, AT THE END OF THE DAY, THAT THEY WOULD PUT HIM ON PROBATION. THEY OFFICIALLY REVOKED HIS LICENSE, BUT THEY SUSPENDED THE REVOCATION, AND HAD A THREE-YEAR PROBATIONARY PERIOD.

VERY POINTEDLY, THE STATE MEDICAL BOARD OF CALIFORNIA ALLOWED DR. CHEUNG TO CONTINUE HIS MEDICAL PRACTICE. THEY DID REQUIRE HIM TO DISCLOSE THE – THE PROBATION TO THE VARIOUS HOSPITALS. BUT, THEY DID NOT REQUIRE HIM TO DISCLOSE IT TO PATIENTS. THAT ALL OCCURRED IN MARCH OF THE YEAR 2000.

SO ONE QUESTION THAT THIS RAISES IS WHETHER OR NOT UNDER THE COBBS STANDARD, DR. CHEUNG WAS UNDER A DUTY TO VOLUNTEER TO HIS PATIENTS ANY OR ALL OF THE FOREGOING. NOW, THIS IS UNLIKE THOSE

CASES WHERE A DOCTOR HAS A CONFLICT OF INTEREST, AS, FOR EXAMPLE, WHERE THE DOCTOR IS AN OWNER OF THE MEDICAL DEVICE COMPANY THAT THE DOCTOR'S RECOMMENDING TO BE USED. OR, UNLIKE THE CASE WHERE THE DOCTOR IS AN ALCOHOLIC OR DRUG ADDICT, UNBEKNOWNST TO THE CALIFORNIA MEDICAL BOARD.

HERE, THE CALIFORNIA MEDICAL BOARD HAD ALL THE FACTS THAT MR. MEIER'S BEEN CONCERNED ABOUT, AND RULED THAT THE DOCTOR WAS QUALIFIED TO CONTINUE PRACTICING MEDICINE. THE BOARD WAS WELL AWARE OF THE 1989 CHIN CASE, AND THE CIRCUMSTANCES. AND ITS ONLY CONCERN ABOUT THAT CASE WAS HOW IT AFFECTED THE DISCLOSURES THAT HE MADE TO THE HOSPITALS. AFTER HEARING HIS [637] EXPLANATION, THE MEDICAL BOARD DECIDED NOT TO REVOKE HIS LICENSE, BUT RATHER, TO PUT HIM ON PROBATION AND TO SPECIFICALLY ALLOW HIM TO CONTINUE TREATING PATIENTS.

THE MEDICAL BOARD WAS IN THE BEST POSITION TO JUDGE WHETHER HIS CONDUCT WAS SUFFICIENT TO BAR HIM FROM PRACTICING. AND IN THE BEST POSITION TO DECIDE WHETHER OR NOT THIS HAD TO BE OR NEEDED TO BE DISCLOSED TO PATIENTS. AND A MOMENT'S THOUGHT WOULD INDICATE THAT IF – THAT THE MEDICAL BOARD IS MUCH

MORE EXPERT THAN THE COURT OR CONSUMERS IN MAKING JUDGMENTS ABOUT THE ABILITY OF THE DOCTOR TO PRACTICE MEDICINE.

NOW, THAT ALL HAVING BEEN SAID, THE COURT THINKS THAT MR. MEIER HAS RAISED AN INTERESTING QUESTION. THERE IS NO CASE IMMEDIATELY ON POINT. IN FACT, THE COURT COULD FIND NO DECISION IN CALIFORNIA THAT ADDRESSES THE DECISION, THE ISSUE OF WHETHER OR NOT A DOCTOR IN THESE CIRCUMSTANCES HAS A DUTY TO DISCLOSE PROFESSIONAL BACKGROUND. AND ALSO, IN THIS CASE, MR. MEIER PRESENTED NO EXPERT TESTIMONY THAT PRACTITIONERS WOULD FEEL OBLIGATED ETHICALLY TO DISCLOSE THIS BACKGROUND.

SO THE ISSUE HAS BEEN PRESENTED TO THE COURT AS A PURE MATTER OF LAW FOR THE FEDERAL COURT TO REFORM CALIFORNIA LAW AND TO STRIKE OUT A BLOW FOR CONSUMERS. BUT IN THE ABSENCE OF TESTIMONY OF THE TYPE FROM EXPERTS, AND IN THE ABSENCE OF CASE LAW THAT WOULD REQUIRE SUCH DISCLOSURE, THIS COURT NOW HOLDS THAT THERE WAS NO DUTY TO VOLUNTEER THIS INFORMATION TO PATIENTS.

[638] THE COURT IS INFLUENCED GREATLY BY THE FACT THAT THE CALIFORNIA MEDICAL BOARD KNEW ALL THE FACTS INVOLVED, AND

IN NO WAY FOUND THAT HE WAS NOT FULLY COMPETENT TO CONTINUE PERFORMING COLONOSCOPIES. THE BOARD IS IN THE BEST POSITION TO MAKE THESE MEDICAL JUDGMENTS. AND TO EVALUATE THE SERIOUSNESS OF THE TYPES OF MALPRACTICE EVENTS IN DR. CHEUNG'S CAREER.

GIVEN THAT THE BOARD ALLOWED HIM TO CONTINUE PRACTICING, WITH THE DISCLOSURE CONDITION ONLY TO HOSPITALS AND NOT ONE TO PATIENTS, IT HAS NOT BEEN DEMONSTRATED ON THIS RECORD THAT DR. CHEUNG HAD A DUTY TO WEAR HIS PROFESSIONAL HISTORY ON HIS MEDICAL GOWN, A LA HESTER PAINE – PRYNNE, OR NATHANIEL HAWTHORNE.

THE NEXT ISSUE IS RELATED. AFTER THE PAINFUL PERFORATION REPAIR SURGERY THAT MEIER EXPERIENCED, HE STILL HAD THE PROBLEM OF THE EVER-PRESENT 25-MILLIMETER POLYP. HE HAD YET ANOTHER CONSULTATION WITH DR. CHEUNG IN 2003. THIS PRECEDED THE THIRD COLONOSCOPY.

AT THIS CONSULTATION, MR. MEIER SPECIFICALLY ASKED WHETHER DR. CHEUNG HAD BEEN SUED FOR MALPRACTICE, EVER BEEN SUED FOR MALPRACTICE. DR. CHEUNG SAID THAT HE HAD BEEN SUED FOR MALPRACTICE, AND THAT THE CASE HAD INVOLVED AN INSTANCE WHERE HE HAD BEEN

BROUGHT IN TO ASSIST A SURGERY ON THE SPUR OF THE MOMENT. HE SAID THAT THE CASE HAD BEEN SETTLED BY MALPRACTICE CARRIER. THIS WAS A REFERENCE TO THE CHIN CASE, ALTHOUGH HE DID NOT CALL IT OUT BY NAME.

[639] THE COURT FINDS THAT THIS RESPONSE WAS SUFFICIENTLY ACCURATE, GIVEN THE CIRCUMSTANCES. DR. CHEUNG WAS RESPONDING TO A COLD QUESTION IN THE MIDDLE OF A CONSULTATION. HIS ANSWER WAS CORRECT, THAT HE HAD BEEN SUED. WHILE HE DID PUT THE CASE IN ITS BEST LIGHT TO DR. CHEUNG, THERE IS NO EVIDENCE THAT THE ACTUAL FACTS WERE DIFFERENT. THE COMPLAINT IS IN EVIDENCE, BUT THAT IS NOTHING MORE THAN A SET OF ALLEGATIONS. DR. CHEUNG WAS NOT REQUIRED, IN ANSWERING THE COLD QUESTION DURING THE CONSULTATION, TO REFERENCE AND TO REPORT THE SPECIFIC ALLEGATIONS THAT HAD BEEN MADE IN THE COMPLAINT.

NOW, IT IS TRUE THAT DR. CHEUNG OMITTED THE LLARENA CASE. THIS WAS THE PRO SE CASE THAT WAS DISMISSED WITH SANCTIONS AGAINST THE PLAINTIFF. MR. MEIER NOW STATES THAT HIS QUESTION TO DR. CHEUNG WAS "HOW MANY TIMES HAVE YOU BEEN SUED," AND NOT "WHETHER." THE CORRECT ANSWER TO THAT QUESTION WOULD HAVE BEEN "TWICE," NOT "ONCE."

WE MUST REMEMBER, HOWEVER, THAT THE LLARENA CASE WAS REALLY A NON-EVENT. A PRO SE COMPLAINT, ALMOST IMMEDIATELY DISMISSED. IT IS ENTIRELY UNDERSTANDABLE THAT DR. CHEUNG WOULD NOT HAVE REMEMBERED THE LLARENA CASE AFTER SO MANY YEARS, IN RESPONDING TO A COLD QUESTION. PLAINTIFF'S RECORD PROVES NOTHING MORE THAN AN INNOCENT MISRECOLLECTION, AND IN ALL EVENTS, THIS COURT NOW HOLDS THAT THE OMISSION OF THE LLARENA PRO SE COMPLAINT WAS NOT MATERIAL, EVEN IF MR. MEIER'S QUESTION HAD BEEN "HOW MANY TIMES," AS OPPOSED TO "WHETHER."

[640] DURING THE TRIAL, MR. MEIER ASSERTED THAT HE HAD ASKED, IN ADDITION, FOR THE ENTIRE MEDICAL PROFESSIONAL DISCIPLINARY RECORD OF DR. CHEUNG. THE COURT SPECIFICALLY FINDS THAT MR. MEIER DID NOT ASK THAT QUESTION. HIS QUESTION DURING THE CONSULTATIONS WERE LIMITED TO MALPRACTICE LAWSUITS.

IT IS ALSO WORTHWHILE TO NOTE THAT NO DAMAGES FLOWED FROM THE THIRD COLONOSCOPY. THAT WAS A – WENT AS PLANNED, AND ROUTINE.

IN THE COURT'S VIEW, THIS NOW FULLY DISPOSES OF THE CASE. MOST OF THE CASE WAS DISPOSED ON SUMMARY JUDGMENT. THIS

RULING FROM THE BENCH NOW DISPOSES OF THE REST OF THE CASE, IN GRANTING THE GOVERNMENT'S MOTION FOR JUDGMENT. THOUGH THE COURT BELIEVES THAT IT HAS ADDRESSED ALL ISSUES THAT IT NEEDS TO ADDRESS, TO THE LIMITED EXTENT THE COURT HAS SOMEHOW NOT ADDRESSED ANY ISSUE, HOWEVER MINOR, THE COURT ADOPTS THE REASONING OF THE GOVERNMENT IN ITS PENDING MOTION AND ITS TRIAL BRIEF.

THE RECORD IS NOW CLOSED. MR. MEIER IS FREE TO PRESENT HIS THEORIES TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

THANK YOU VERY MUCH. WE ARE IN ADJOURNMENT. AND THE NEXT CALENDAR WILL BE JUST A FEW MOMENTS. GIVE ME A FEW MINUTES.

MR. MEIER: THERE'S NO OPPORTUNITY TO CORRECT AN INACCURACY ON THE RECORD ABOUT SOMEONE CALLING ME BACK FROM THE [641] VA, OR THAT I WAS IN THE HOSPITAL FOR TEN DAYS, OR – THERE'S AT LEAST THREE OF THEM.

THE COURT: MR. MEIER, I'VE DONE THE BEST I CAN.

MR. MEIER: OKAY. I'M JUST MAKING THE RECORD.

THE COURT: YOUR NEXT STOP IS THE U.S. COURT OF APPEALS.

MR. MEIER: OKAY, GOOD. THANK YOU.

THE COURT: ALL RIGHT.

MR. MEIER: APPRECIATE THE TIME YOU TOOK, YOUR HONOR.

MS. DOWLING: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME.

(CONCLUSION OF PROCEEDINGS)

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(2)

Supreme Court, U.S.
FILED
OCT 8 - 2009
OFFICE OF THE CLERK

No. 08-1507

In the Supreme Court of the United States

TERRY L. MEIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner brought suit under the Federal Tort Claims Act for injuries allegedly resulting from his negligent treatment at a Veterans Administration outpatient clinic. The questions presented are:

1. Whether petitioner may avoid principles of *respondeat superior* liability by premising suit against the United States not on the alleged negligence of a federal employee but on California case law requiring an employer to ensure the competence of its work force.

2. Whether the court of appeals erred in its application of California law to claims for failure to establish adequate policies for emergency medical services; for failure to provide medical records to a patient; and for failure to disclose to a patient potential secondary risks of a recommended medical procedure that did not materialize.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted in 310 Fed. Appx. 976. The decisions of the district court (Pet. App. 6-29, 30-56) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2009. On April 20, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 3, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, waives the sovereign immunity of

the United States for torts "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674 (providing, subject to statutory exceptions, that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances").

2. Petitioner underwent three colonoscopy procedures in 2002 and 2003 at a Veterans Administration (VA) Outpatient Clinic in Martinez, California. Pet. App. 6-7. After the first procedure, the treating physician, Dr. Eddie Cheung, informed petitioner that he had partially removed a lesion that was a tubulovillous adenoma. *Id.* at 7. Dr. Cheung recommended treatment, fearing that the lesion could become cancerous. *Id.* at 34. Dr. Cheung discussed two treatment options: surgery or a second colonoscopy. *Id.* at 7. Dr. Cheung informed petitioner that one risk of a repeat colonoscopy was perforation, which could require surgery to repair. *Id.* at 7, 34. Petitioner chose to undergo a second colonoscopy. *Id.* at 7.

After Dr. Cheung performed the second colonoscopy, petitioner was discharged from the clinic with written instructions to call 911 or go to the nearest hospital if he experienced severe abdominal pain. *Id.* at 8. He was also provided a phone number for the emergency room at Mather Air Force Base. *Ibid.* Petitioner returned home. Pet. App. 7-8. The next morning he had sharp abdominal pains, for which he took pain pills. *Id.* at 8. In the afternoon he called the Oakland VA clinic and left

a message. *Ibid.* He then called the Mather Air Force Base number provided on his discharge instructions and was told to wait for a call back. *Ibid.* After about five hours, petitioner had a friend take him to the emergency room at Highland Hospital. *Id.* at 8, 36. Petitioner underwent emergency surgery to repair a perforation of his cecum and spent ten days in the hospital recovering. *Id.* at 7-8, 36. Petitioner experienced "excruciating pain" both before and after the surgery. *Id.* at 36.

Petitioner had a third colonoscopy to remove additional polyps about six months later. Pet. App. 37. Dr. Cheung performed the procedure and there were no complications. *Ibid.*

3. Petitioner filed a complaint asserting ten claims against the United States under the FTCA, seeking damages for the emotional distress he asserts was caused by the VA's conduct. Counts 1-3 alleged a failure to obtain informed consent before performing the colonoscopies. Pet. App. 8. Count 4 alleged that the VA negligently hired Dr. Cheung, and Count 5 alleged that the VA failed to train and supervise Dr. Cheung. *Id.* at 9. Count 6 asserted that the VA failed to create policies for responding to medical emergencies. *Ibid.* Count 7 contended that the VA failed to provide peer review. *Ibid.* Count 8 asserted a failure to produce medical records. *Ibid.* Count 9 alleged a failure to answer petitioner's questions concerning his care, and Count 10 alleged unauthorized publication of petitioner's medical records. *Ibid.*

The district court awarded summary judgment to the government on Counts 4-10 of petitioner's complaint. Pet. App. 12-21, 27-28. With respect to Counts 4 and 5, alleging negligent hiring and supervision of Dr. Cheung, the court held that a private individual would not be lia-

ble under California law for a hospital's negligent hiring or supervision of medical staff. *Id.* at 13-14. The district court further noted that even if the United States could be held liable for a hospital's negligent hiring or supervision, summary judgment would still be granted because petitioner did not identify any genuine issues of material fact that would support the allegation that the VA breached a duty of care in the hiring or supervision of Dr. Cheung. *Id.* at 14 n.3. The district court also granted summary judgment on Counts 6-9, finding no basis in California law for tort liability based on an alleged failure to provide policies for handling medical emergencies; to provide competent peer review; or to maintain and provide access to medical records. *Id.* at 15-19. The district court held that Count 10, petitioner's tort claim for unauthorized disclosure of his medical records, would be actionable under California law, but granted summary judgment to the United States because petitioner provided no evidence that petitioner's records were disclosed to anyone other than himself. *Id.* at 20-21, 28.

The district court denied summary judgment on Counts 1-3, ruling that petitioner had identified genuine issues of material fact for trial on his informed consent claims. Pet. App. 22-29. After petitioner's submission of his case at trial, the district court granted judgment as a matter of law in favor of the government, finding that the VA did not fail to obtain informed consent. *Id.* at 31-56; see *id.* at 2.

4. The court of appeals affirmed in an unpublished memorandum order. Pet. App. 1-5. The court of appeals upheld the district court's Rule 52 judgment for the government on Counts 1-3. *Id.* at 2. The court of appeals rejected petitioner's contention that his physician had a

duty to disclose not only the potential complications of the colonoscopy that was performed, but also to disclose potential complications of a treatment that might be needed to treat the potential complication. Thus, the court of appeals found no breach of a duty to disclose under California law where Dr. Cheung informed petitioner that there was a risk of perforation during the colonoscopy that might require emergency surgery to repair, but did not disclose potential complications that might arise from that emergency surgery—none of which in fact materialized. *Id.* at 2-3. The court further agreed with the district court that petitioner failed to establish that the VA or Dr. Cheung had a duty to disclose Dr. Cheung's professional medical history. *Id.* at 3.

The court of appeals likewise affirmed the district court's award of summary judgment as to Counts 4-9. Pet. App. 3-4. The court of appeals held that petitioner had failed to establish a basis for any of those claims that would be actionable against a private person in similar circumstances under California law. *Ibid.* Finally, the court of appeals affirmed the grant of summary judgment for the defendant on Count 10, concluding that petitioner had identified no genuine issue of material fact that would substantiate his claim for invasion of privacy under California law. *Id.* at 4-5.

ARGUMENT

The court of appeals correctly held that petitioner had no valid basis to recover under the FTCA. Its decision is unpublished and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is not warranted.

1. Petitioner complains of injuries related to his treatment at the VA Outpatient Clinic in Martinez, California by Dr. Cheung, his treating physician. Petitioner does not, however, press a claim based on Dr. Cheung's conduct under principles of *respondeat superior*. Instead, he alleges, in his fourth and fifth causes of action, that the VA negligently hired and supervised Dr. Cheung. Petitioner seeks to premise liability on "the doctrine of corporate negligence" recognized in *Elam* v. *College Park Hospital*, 132 Cal. App. 3d 332, 340-341 (Ct. App. 1982), in which a California intermediate court held that a hospital may be held liable in tort for its "failure to insure the competence of its medical staff." Pet. App. 21. On this basis, petitioner argues that the United States may be held liable under the FTCA for the VA's asserted failure to ensure the competence of Dr. Cheung.

As the courts below correctly concluded, the theory of "corporate hospital liability" invoked in *Elam* does not provide a basis for suing the United States under the FTCA. The FTCA makes the United States liable under principles of *respondeat superior* for tort claims based upon the negligent acts or omissions of "employee[s] of the Government."[1] See 28 U.S.C. 1346(b)(1) (providing

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[1] See, *e.g.*, *Tort Claims Against the United States: Hearings on S. 2690 Before Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 44 (1940) (draft of FTCA was intended to provide a remedy where "the Government as such did not commit the tort, but it was done *through its agent or servant*") (emphasis added); *id.* at 34 (draft bill would recognize claims for injury based on an act by a Government officer or employee that would be considered tortious "if it had been committed *by the agent* of a private individual or a private corporation") (emphasis added); see also Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 2(a)(2), 102 Stat. 4563 (28 U.S.C. 2671 note) (FTCA makes the United States

district courts with exclusive jurisdiction on claims based on "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment"); see also *Laird* v. *Nelms*, 406 U.S. 797, 801 (1972) (the FTCA's legislative history "indicates that Congress intended to permit liability essentially based on the intentionally wrongful or careless conduct of Government employees, for which the Government was to be made liable according to state law *under the doctrine of respondeat superior*") (emphasis added); *Johnson* v. *Sawyer*, 47 F.3d 716, 730 (5th Cir. 1995) (en banc) ("All FTCA liability is *respondeat superior* liability."). As the *Elam* court expressly acknowledged, the theory of direct corporate liability is distinct from the long-established recognition that a hospital, as an employer, may be vicariously liable for the medical malpractice of its employees.[2] See 132 Cal. App. 3d at 337-338.

The United States, of course, may be sued for the alleged negligence of its employees where a private corporation in similar circumstances would be held liable for the negligent acts or omissions of its employees. See, *e.g.*, Federal Employees Liability Report and Tort

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"responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment").

[2] The purpose of the *Elam* cause of action is to hold hospitals liable for the conduct of "staff physicians"–that is, physicians who are not employees of the hospital. See 132 Cal. App. 3d at 337, 341. Application of that theory to the United States would accordingly hold the government liable for the conduct of non-employees, running afoul of the FTCA's contractor exclusion, 28 U.S.C. 2671. See *Logue* v. *United States*, 412 U.S. 521 (1973).

Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, § 2(a)(2), 102 Stat. 4563 (28 U.S.C. 2671 note) (FTCA makes the United States "responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility *of an employer* for torts committed by its employees within the scope of their employment") (emphasis added); see also *Rayonier Inc.* v. *United States*, 352 U.S. 315, 318 (1957) (claim for injuries caused by "negligence of employees [of the United States]" is actionable under the FTCA if the relevant state law "would impose liability on private persons *or corporations* under similar circumstances") (emphasis added). But that is only the case when the similarly-situated private corporation's liability would be grounded in *respondeat superior* principles. Petitioner therefore may not, as the court of appeals recognized, circumvent principles of vicarious liability by asserting an institutional duty to "insure the competence of its medical staff."[3]

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[3] *Adams* v. *United States*, 420 F.3d 1049 (9th Cir. 2005), cited by the courts below, Pet. App. 3; *id.* at 13, addressed the different but related question of whether a corporate entity can be an "[e]mployee of the government," 28 U.S.C. 2671, under Section 2 of the Westfall Act, 102 Stat. 4563. The Westfall Act provides that the United States may be substituted as defendant in an action against a government employee if the alleged tort was committed within the scope of his employment. 28 U.S.C. 2679. The statutory definition of an "[e]mployee of the government" includes "persons acting on behalf of a federal agency in an official capacity," 28 U.S.C. 2671, and the *Adams* court correctly concluded that "[s]everal contextual features of the FTCA indicate" that Congress meant 'persons' in this provision "to apply only to natural persons" and not corporations. 420 F.3d at 1053; accord *Daniels* v. *Liberty Mut. Ins. Co.*, 484 F.3d 884, 886 (7th Cir. 2007) ("[A] corporation could not be a federal 'employee' on any understanding."). The court noted

Even if petitioner were correct that he could sue the United States under a corporate negligence theory, summary judgment would still have been proper. Further review of the court of appeals' ruling would therefore still be unwarranted. As the district court held, Pet. App. 14 n.3, even assuming the applicability of California's theory of corporate liability under the FTCA, petitioner failed to identify any genuine issues of material fact indicating that the VA breached any state-law corporate duty in hiring or supervising Dr. Cheung. Petitioner contends (Pet. 18) that there is a dispute of material fact about whether Dr. Cheung actually possessed the requisite qualifications for appointment under VA employment criteria (because he had been subjected to disciplinary action by the New York State and California Medical Boards). That fact-dependent assertion does not merit review by this Court. Moreover, the uncontradicted record evidence established that VA personnel verified that Dr. Cheung had a "full and unrestricted license to qualify for a medical doctor position." Clarkston Dec. ¶ 2, No. C 05-04404 Docket entry No. 60 (N.D. Cal. Nov. 17, 2006). The district court noted that the VA was aware of Dr. Cheung's professional history when it hired him, and it correctly concluded that petitioner "pointed to no facts that the VA either did not

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that the purpose of the Westfall Act was to "protect natural persons whose personal fortunes might suffer, not artificial corporate entities which have limited liability," *Adams*, 420 F.3d at 1054. Because the United States cannot be held vicariously liable under the FTCA for conduct by a supposed "employee" who is ineligible for certification under the Westfall Act, the reasoning in *Adams* supports the determination by the courts below that an FTCA cause of action does not lie in this case premised on the allegedly tortious conduct of the VA as an institution, rather than the acts of its employees.

adhere to its established protocols for background checks when it hired Dr. Cheung or that those protocols were themselves deficient." Pet. App. 14 n.3.

2. Petitioner's remaining issues concern the application of California law to the record evidence. He does not identify any significant issues of federal law, any conflict among the courts of appeals, or any other "compelling reason[]" for this Court's review. Sup. Ct. R. 10.

a. Petitioner contests (Pet. 26-27) the dismissal of his claim against the VA for failure to develop adequate policies related to emergency services, relying on *Baxter* v. *Alexian Bros. Hospital*, 214 Cal. App. 3d 722, 725-727 (Ct. App. 1989). That decision, however, was limited to the narrow issue of whether a California statute, setting forth minimum qualifications for expert witnesses testifying in cases alleging malpractice by an emergency room physician, applies to a suit against a hospital that does not allege negligence by an emergency room physician. The court specifically limited its holding to that statutory construction issue and declined to opine on the merits of the plaintiffs' claim that a hospital failed to provide essential backup services to its emergency room. *Id.* at 726.

b. Petitioner likewise errs in urging (Pet. 28-33) that California law supports a cause of action for emotional distress resulting from the VA's failure to respond to questions and provide him with copies of his medical records. As the courts below recognized, the state statutes relied on by petitioner do not indicate that a private person would be liable in a private tort action for failure to provide the requested information. See Pet. App. 4, 17-19 (citing Cal. Health & Safety Code §§ 123100,

123110, 123120 (West 2006); Cal. Bus. & Prof. Code §§ 2262, 2266, 2282 (West 2003)).[4]

c. The court of appeals also properly affirmed dismissal of petitioner's claims based on failure to obtain informed consent. Pet. App. 2-3; see *id.* at 43-44. Dr. Cheung disclosed to petitioner the serious potential complications of the colonoscopy itself, including perforation of the bowels, bleeding, and death, *id.* at 32-33, and petitioner does not argue to the contrary. The risks identified by petitioner here (Pet. 35) and in the courts below are secondary risks associated with the surgery that would be necessary to repair a perforation at the tumor site (which is not where the perforation occurred in this case). Pet. App. 2-3, 38-39. As the district court correctly concluded, petitioner failed to establish that those secondary risks themselves constituted serious known risks of the *colonoscopy* procedure as to which disclosure was required. *Id.* at 43. Finally, as the courts below also correctly recognized, Dr. Cheung had no duty under California law to inform petitioner of his complete malpractice history, especially when the California Medical Board itself did not require him to disclose that information to patients. *Id.* at 3, 49-53.

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[4] Neither *Scripps Clinic* v. *Superior Court*, 108 Cal. App. 4th 917 (Ct. App. 2003), nor *Branch* v. *Homefed Bank*, 6 Cal. App. 4th 793 (Ct. App. 1992), relied on by petitioner (Pet. 32), recognized a cause of action for emotional distress based on the cited statutory provisions or involved a claim for alleged failure to turn over medical records or answer questions concerning medical care. See *Scripps Clinic*, 108 Cal. App. 4th at 930-931 (claim of negligent infliction of emotional distress based on a medical group's failure to give adequate notice before transferring a patient to another medical group for treatment); *Branch*, 6 Cal. App. 4th at 799-800 (no emotional distress damages available for claim of negligent misrepresentation in employment contract when only other harm was economic in nature).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2009